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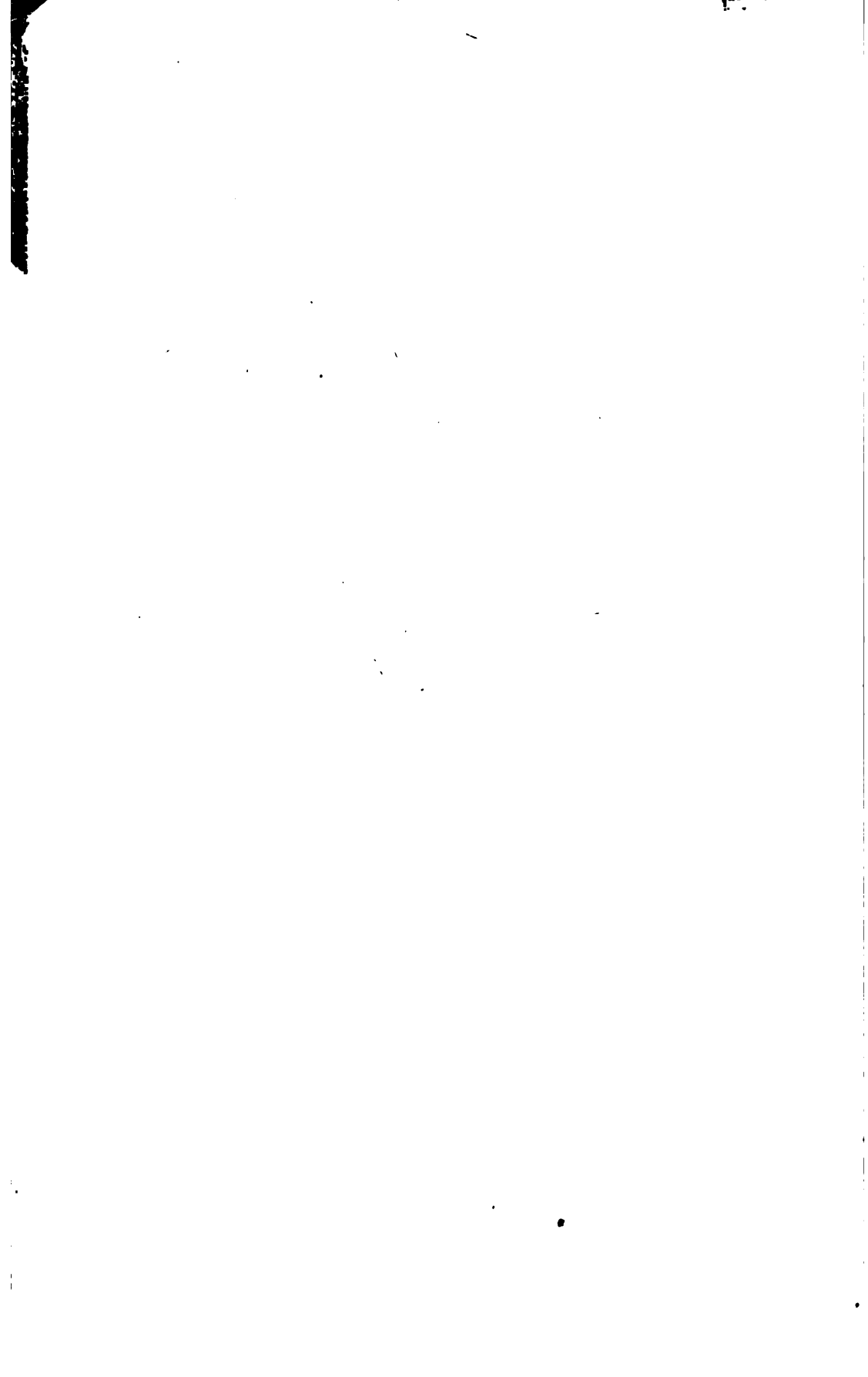
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DIGESTED INDEX

TO ALL THE

Reports in the House of Lords,

FROM THE

COMMENCEMENT OF THE SERIES BY DOW, IN 1814,

TO THE

END OF THE ELEVEN VOLUMES OF HOUSE OF LORDS CASES;

With References to more recent Decisions :

INTENDED AS A SUPPLEMENTARY VOLUME



BY

CHARLES CLARK, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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N O T I C E.

THE decisions of the Supreme Tribunal of this country, however authoritative in themselves, were not, until of late years, at all familiar to the great body of the Legal Profession, the early reports of them being in the hands of but few persons. In that tribunal, more than in any other, questions can be considered, as they have been, upon purely legal principles, freed from the fetters and obstructions of mere precedent. The acknowledged eminence of the noble and learned persons by whom the decisions have been pronounced, gives them a value beyond their official authoritativeness. It is hoped that this Digest will have the good effect of making the Profession at large familiarly acquainted with them.

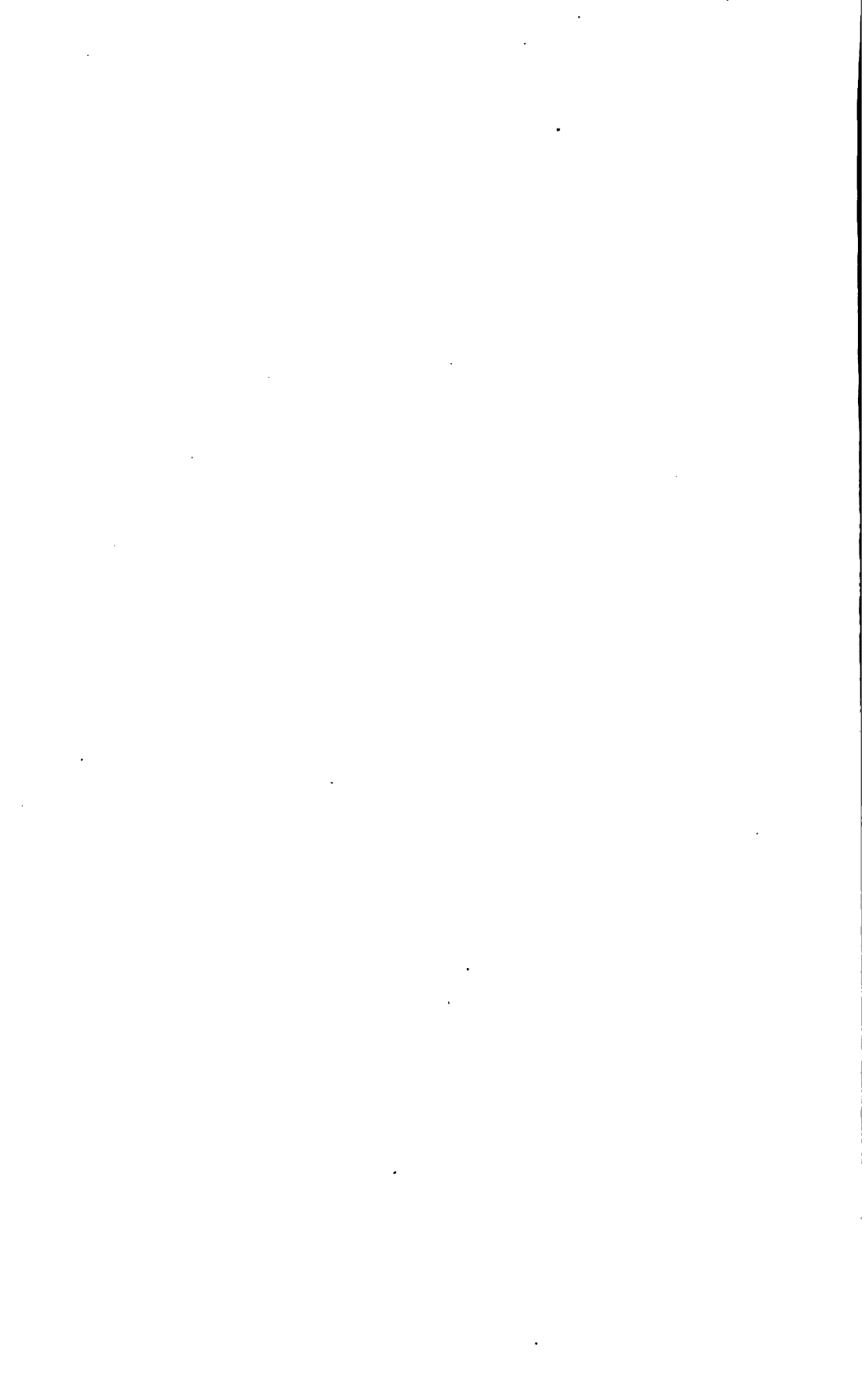


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I N D E X

TO

THE PRINCIPAL MATTERS

IN

APPEALS AND PEERAGE CASES IN THE HOUSE OF LORDS,

FROM 1 DOW TO 11 HOUSE OF LORDS CASES, INCLUSIVE.

1813 to 1866.

ABANDONMENT. *See* INSURANCE.

ABATEMENT, PLEA IN. *See* PLEADING. PRACTICE.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in *Dublin*, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in Court according to the Act 56 *Geo.* 3, c. 87, but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses duly sworn on whose evidence the indictment was found, nor allege that the witnesses, on whose evidence it was found, were not affirmed, the plea was held bad.

And for the same reasons, a plea in abatement, on the ground that the swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 *Vict.* c. 37, was held bad.—*O'Connell v. The Queen*, 11 Cl. & F. 156.

See Irwin v. Grey, L. R., 2 H. L., 22.

ACCOUNTS. *See* ATTORNEY AND CLIENT. BANKRUPT. EQUITY. INTEREST. MARRIAGE SETTLEMENT. PARTNERSHIP. PRINCIPAL AND AGENT. TRUST AND TRUSTEES.

Innes, consignee of a *West Indian* estate, was appointed trustee thereof by *B.*, the tenant for life, for the purpose of keeping down incumbrances. *Innes* was also private agent and banker for *B.*, with the understanding that *B.* was not, nor were his funds, to be liable for advances made by *Innes* for the estate. *Innes* becoming embarrassed, was declared bankrupt, and assignees were appointed:

Held, by the Lords, reversing orders of the Court of Chancery on a bill filed by *B.*, and the other owners of the estate, to remove *Innes* from the possession and management, that a sum found due from *Innes* to *B.* on their private dealings might be set off against a sum found due to *Innes* in respect of his advances and payments for the estate.—*Baillie v. Edwards*, 2 H. L. Cas. 74.

ACCUMULATION. *See* SURPLUS.

1. A testator devised his freehold and copyhold estates, charged with an

A

ACCUMULATION—continued.

nuities for his sons and a daughter, upon trust to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain 21, when the accumulations were to be divided among such of them as should be then living; and he directed that in case any of his sons and daughter should be living after the youngest of his grandchildren should have attained 21, the residue of the said rents and profits should be farther accumulated, and such accumulation divided among his grandchildren, who should be living at the death of the survivor of his sons and daughter; and charged as aforesaid, he directed that after the death of such survivor, his said estates should stand charged for 20 years, with the payment of two-third parts of the clear produce of them, in equal proportions, of so much money as would in 15 years make 30,000*l.*, which sum, with the interest thereof, he directed should be equally divided among all his grandchildren who should live to attain the age of 21, their executors or administrators. The testator died in 1812, leaving 10 grandchildren, nine of them children of one of the annuitants. All of them lived to attain 21, the youngest having attained that age in 1830. The last survivor of the testator's own children died in 1831:

Held, that the charge of two-thirds of the produce of the estates was a provision for accumulation within the Act 39 & 40 *Geo. 3*, c. 98, and therefore void, so far as it extended to any period after the expiration of 21 years from the testator's death.—*Evans v. Hellicr*, 5 Cl. & F. 114.

See *Matthews v. Keble*, L. R., 4 Eq., 470.

2. Money was paid into Court to abide the result of a bill, and vested in stocks:—Held, that the party declared entitled to the stock was entitled to the accumulations thereon.—*Barraut v. Stockton and Darlington Railway Company*, 1 H. L. Cas. 18.

ACQUIESCENCE. See LAND TAX.

Sale in 1800, by the testamentary guardians of *M.*, an infant, of some

ACQUIESCENCE—continued.

lots of his land to redeem the land-tax. *H.* purchases one of the lots, and pays the price into the hands of his own agent, who was also agent for the vendors, but the agent neglects to pay it into the bank, in the terms of the Land-tax Redemption Act. *M.* comes of age in 1807, and afterwards accounts with the agent as if the agent was his debtor for the purchase-money paid by *H.*; and the agent not being able to pay *M.* in 1825, brought his ejectment. The appellant's representatives of *H.* filed their bill in the Exchequer to restrain proceedings in the ejectment, and to compel *M.* to complete the title. The bill was dismissed, and the dismissal was affirmed by the Lords, principally on the ground that *H.* all along knew that the money had not been paid into the bank, and that that which was necessary to give validity to his title had not been duly performed.—*Hicks v. Morant*, 2 Dow & C. 414.

See *Doe d. Blewitt v. Phillips*, 1 Q. B. Rep. 84.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:

Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease.—*Archbold v. Scully*, 9 H. L. Cas. 360.

ACTION. See PLEADING.

If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal.—*Ferguson v. Kinnoull (Earl)*, 9 Cl. & F. 251.

Persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts.

ACTION—continued.

In such actions no allegation of malice is necessary.—*Ferguson v. Kinnoull (Earl)*, 9 Cl. & F. 251.

The taking on his trials a presenter to a church in *Scotland*, is a ministerial act, which the Presbytery is bound to perform, and for the neglect or refusal to perform which, every member of the Presbytery is liable to make compensation in damages to the party injured. And he may maintain such action against the members collectively and individually.—*Id.*

See *Fcoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507; *Attorney General v. Murdoch*, 1 De G., M., & G. 86.

2. Though a case is of first impression if it shows a concurrence of loss and damage from the act complained of, the action will be maintainable.—*Lynch v. Knight*, 9 H. L. Cas. 577.

ADEMPTION. See **WILL**.

ADJUDICATION. See **PRESCRIPTION**.

ADMINISTRATION. See **TRUST AND TRUSTEE. EXECUTOR.**

1. An administrator beginning to act in 1771, made only a partial distribution of the fund, and a bill for an account was filed in 1772, but (chiefly through the administrator's fault) nothing was effectually done for many years. In 1810 there was a decree in the Court below that the administrator ought not to be charged with interest:

Held in this House, that the facts showed the administrator to have been deeply in fault, and he was ordered to be charged with the full legal interest on the sums remaining undistributed during the whole period of their retention, the amount to be taken with annual rests, and the interest charged on the annual balance; and also to pay the costs.—*Stacpoole v. Stacpoole*, 4 Dow, 209.

See *Attorney General v. Alford*, 4 De G., M., & G. 843; explained in *Mayor of Berwick v. Murray*, 7 De G., M., & G. 519; *Fletcher v. Green*, 33 Beav. 513; *Blogg v. Johnson*, L. R., 2 Ch. Ap., 225; *Turner v. Burkinshaw*, Id. 488.

ADMINISTRATION—continued.

2. The persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in *England* from the proper Ecclesiastical Court there, and afterwards consented to the appointment, by the Court of Session in *Scotland*, of other persons as trustees and executors, in place of those named in the will, with all the powers that had been thereby given to them. These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability:

Held, by Lords (reversing a decree of the Court of Session), that the personal estate in *England* must be administered there by administratrix, by virtue of the letters of administration.—*Preston v. Melville*, 8 Cl. & F. 1.

See *Carron Company v. Maclaren*, 5 H. L. Cas. 416; *Enohin v. Wylie*, 10 H. L. Cas. 19; *Drummond v. Drummond*, L. R., 2 Ch. Ap., 36.

ADMIRALTY.

In an action by a shipowner against the charterers for freight, the charterers pleaded that after the freight had been earned, and after the commencement of the suit, the obligee of a bottomry bond, by which ship and freight were hypothecated, instituted in the Court of Admiralty a suit against ship and freight, whereon a monition issued, commanding the plaintiff to bring into Court the proceeds of the wreck and stores of the ship, and the defendants to bring into Court the money due for freight, to abide the judgment of the Court, and that the defendants had done so:

Held, affirming the judgments of the Courts of Exchequer and Exchequer Chamber, that this was a good plea in bar to the action. Construction of the 3 & 4 Vict. c. 65.—*Place v. Potts*, 5 H. L. Cas. 383.

ADULTERY. *See* **DIVORCE.** **LEGITIMACY.**

Adultery, alleged to have been committed by the petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *a mensâ et thoro*, and the actual dissolution of the marriage, is a charge into which the Divorce Court is bound to inquire.

If such adultery has been committed between the time when a decree for a divorce, *a mensâ et thoro*, under the old law, was pronounced, and the time when a petition under the 20 & 21 *Vict. c. 85*, was presented, praying for a dissolution of the marriage, the Judge Ordinary, on being duly informed thereof, is not "bound," under the 31st section of the statute, to dissolve the marriage.—*Lautour v. The Queen's Proctor*, 10 H. L. Cas. 685.

See *Gipps v. Gipps*, 11 H. L. Cas. 1; *Wilson v. Wilson*, L. R., 1 Prob. & Div., 180.

ADVOWSON. *See* **GRANT.**

1. Where a rectory attached to a prebend falls vacant, and before filling it up the prebendary dies, the presentation belongs to the administratrix, and not to the successor.—*Mirehouse v. Rennell*, 1 Cl. & F. 527.

See *Carlisle v. Whaley*, L. R., 2 H. L., 402.

2. A. purchased an advowson. The living itself was subject to a mortgage to the Governors of Queen Anne's Bounty for money advanced to repair the parsonage house. The existence of this mortgage on the living was not communicated to the purchaser of the advowson, who discovered it after the arrangements for the purchase had been made; no fraud or wilful concealment or misrepresentation was charged:

Held, that the purchaser was not entitled to compensation in respect of the mortgage, which was a charge upon the living, but not upon the advowson, and that he was bound specifically to perform his contract.—*Wood v. Majoribanks*, 7 H. L. Cas. 806.

AFFIDAVIT. *See* **IRISH TENANTRY ACTS.**

The 23 & 24 *Geo. 3, c. 39 (Ir.)*, gives by s. 1, to "any tenant for life or lives

AFFIDAVIT—continued.

by settlement, dower, or courtesy, jointure, lease, or office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding 14 years unexpired, who shall plant, or cause to be planted, any timber trees," &c., the right to cut the same during the term. The 2nd section provides, "that any tenant so planting" &c., shall, within 12 months, lodge with the clerk of the peace of the county an affidavit, "reciting the number and kinds of the trees planted, and the name of the lands, in form following." The form given is, "I, A. B., do swear that I have planted, or caused to be planted, on the lands of , held by me from "

and "that I have given notice to the person under whom I immediately derive, or his agent, of my intention to register." A. held lands from B. under leases for lives, on different demises granted by B.'s ancestor to A.'s ancestor. A. planted trees, and made the affidavit, but mentioned lands held under different demises, and did not distinguish the number of trees planted on each land:

Held, that the 2nd section of the statute included a tenant for life, and that the affidavit was sufficient:

Held also, that under this statute an affidavit might be made by the agent and manager of A., for and on behalf of A.

A. also occupied lands under C., adjoining to those of B.; A.'s agent made an affidavit, including both descriptions of lands, and giving the gross number of the trees planted, but not distinguishing the number planted on the land of B. from those planted on the land of C.:—Held insufficient.—*Mountcashell v. O'Neill*, 5 H. L. Cas. 937.

AGENT. *See* **ARMY AGENT. PRINCIPAL AND AGENT. ATTORNEY AND CLIENT. FAMILY ARRANGEMENT.****AGREEMENT.** *See* **ATTORNEY AND CLIENT. BOND. FRAUD. HUSBAND AND WIFE. SPECIFIC PERFORMANCE.**

1. A. held a church lease renewable on payment of a fine; he sub-let a part

AGREEMENT—*continued.*

of the property to his nephew *John*. He made a will, leaving the property to his great nephew *William*, and to *William's* son in tail. A few days before his death, and while he was suffering very much, he signed an agreement on terms most extremely advantageous to *John*, for a sub-lease to *John*, not only of the part already in *John's* occupation, but of other parts of the same estate. On the same afternoon he expressed his wish that the agreement should not stand, when *John* said, "If you do not approve of it when you are better, the lease shall be cancelled." Nothing was then done, and *A.* shortly afterwards died. The great nephew filed a bill to have the agreement set aside on the ground that the uncle had been surprised into entering into it, being at the time too weak to attend to any business which required deliberation. The Court, on the evidence, set aside the agreement:

Held, that the decision of the Court below must be affirmed; and as it was unfit that the agreement should be acted on in equity, it was unfit that it should be acted on at law, and so was ordered to be delivered up to be cancelled.

The agreement purported to be made for valuable consideration. Though the parties were near relatives and on good terms, it could not be treated as partly made from natural love and affection, and so sustained.—*Willan v. Willan*, 2 Dow, 274.

See, *Swinfen v. Swinfen*, 27 Beav. 151.

2. While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. A judgment of the Court below, which admitted the property in a chattel to be in *A.*, but, on the supposition of an implied condition in a correspondence between *A.* and *B.*, treated the implied condition as an agreement, and directed the chattel to remain for ever in the possession of *B.*, was therefore held to be erroneous, and was reversed.—*Clerk v. Adam*, 1 Cl. & F. 242.

3. *A.* became possessed of a tract of open waste ground called the *Lydes*. He

AGREEMENT—*continued.*

built houses upon it, and gave the row of houses thus built the name of *Somerset-place*. There were gardens behind these houses, and a lawn in front, and roads and footpaths connecting them with the roads of the neighbourhood. *A.*, to carry on the building speculation in which he was engaged, borrowed money at different times from *B.*, and occasionally made up accounts of advances and payments, and struck balances, for which he gave different securities. In the year 1808, he gave as a security for the repayment of the money then due, an agreement, whereby he charged certain houses at that time unfinished, "and likewise all and every other the messuages or dwelling-houses, lands, hereditaments, and fee-farm ground rents, also situate and lying in *Somerset-place* aforesaid, adjoining the said unfinished messuages or dwelling-houses," with the payment of the sum then found due to *B.*; and he thereby agreed to execute to *B.* "a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground rents." In 1810, *A.* collected the water from springs on the *Lydes* into a reservoir, which he formed on the lawn, and he agreed with certain other persons to supply their houses with water, on receiving a compensation "in the nature of a rent issuing out of their premises for ever after, and recoverable in the usual manner by distress and entry." In 1813 another settlement took place between him and *B.*, and *A.* entered into another agreement with *B.*, on the same terms as the former, for securing payment of the sum then found due to *B.* The title deeds of the *Lydes* were then left by *A.* in the hands of *B.'s* solicitor. After all this had been done, a house, called the Ivy House, was built upon a strip of land at the south-western extremity of the space which had been called the *Lydes*, and outside the carriage road which ran round the lawn to the houses:—Held, that the reservoir and the Ivy House were, by force of the terms in *A.'s* agreement, chargeable with the payment of the debt to *B.*—*Turner v. Dickenson*, 3 Cl. & F. 593.

4. *P.* being seized of an estate by lease for

AGREEMENT—*continued.*

lives renewable for ever, subject to a rent equal in amount to a rent which a sub-tenant paid him for part of the estate, agreed in writing to let the other part of the estate in his own possession to *D.*, his brother, for the lives of *D.* and two others, and the life of the survivor, free from rent and assessments during *D.*'s life, to be subject to a rent of 350 *l.* during the other lives or life surviving *D.*; leases to be executed at the request of either party. A memorandum was added of the same date, signed by both parties, stating "rent to be payable half-yearly every 1st of May and 1st of November henceforward." Prior to the agreement, *D.* being elected member of Parliament for a city, was required to take the member's qualification oath; and a petition was threatened against his return for want of qualification, but was abandoned at the date of the agreement. *P.* died intestate without executing a lease or parting with possession:—Held, by the Lords (affirming a decree which had dismissed a bill filed by *D.* against *P.*'s heir-at-law, for specific performance), that the circumstances and evidence showed that the object of the agreement was to give *D.* a qualification for Parliament; that no interest in the property passed, and that the parties never intended that the agreement should be executed; and therefore the execution of it could not be enforced, either as an agreement for valuable consideration (which was the case made by the bill) or as a gift.—*Callaghan v. Callaghan*, 8 Cl. & F. 374.

See 21 & 22 Vict. c. 26, abolishing qualification for members of Parliament.

5. A deed of separation between a husband and his wife having been drawn up, but not executed by the husband:

Held, that his executing such deed was a legal consideration for an agreement by a third person, to pay a sum of money to the husband towards the discharge of certain debts and expenses, for which the husband was solely liable.—*Jones v. Waite*, 9 Cl. & F. 101.

AGREEMENT—*continued.*

See *Wilson v. Wilson*, 1 H. L. Cas. 538, and 5 H. L. Cas. 40.

6. *T. H.*, a merchant in partnership with *A. H.*, died in 1790, unmarried and intestate, possessed of leasehold property, and leaving his sisters, *Lady S.* and *Mrs. D.*, his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent; and *Lady S.* and *Mrs. D.*, with consent of their husbands, duly renounced administration of his estate. By indenture made between *Sir W. S.* and his wife, *Lady S.* of the first part, the said *A. H.* of the second part, and his then new partner *R.* of the third part, after reciting that the former partnership was insolvent, that *A. H.* and *R.* had undertaken to settle with the creditors by composition, which could not be effected without administration of *T. H.*'s personal estate, and that there had been money transactions between him and *Sir W. S.*, of which neither had kept any account, *Sir W. S.* and *Lady S.* renounced, at *R.*'s request, all their right to the said administration in favour of *A. H.*, who, in consideration thereof covenanted, after obtaining such administration, to release *Sir W. S.* from all claims which he, as administrator of *T. H.* or otherwise, might have on *Sir W. S.*; and *Sir W. S.*, in consideration of such release, covenanted for himself, his heirs, executors, and administrators, and for his said wife, that they, *Sir W.* and *Lady S.*, would, after such administration should be granted to *A. H.*, execute to him, his executors and administrators, a release of all claims whatsoever which they might have on him as administrator of *T. H.*, or otherwise. The creditors also by a composition deed, agreed to accept 15*s.* in the pound, payable by instalments by *A. H.* and *R.*, and to allow *A. H.* to take out administration of the estate of *T. H.* Afterwards *D.*, the husband of *Mrs. D.*, by a deed-poll, after reciting that he had an unsettled demand against *T. H.*'s estate, and that the effects of the late partnership, together with his private estate, were insufficient to pay the partnership debts, and that the creditors entered into a composition and

AGREEMENT—continued.

agreement with *A. H.* and *R.* as aforesaid—declared that a bond for 1,000 *l.* given to him by *A. H.* and *R.*, pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from *T. H.*, and of all claims whatsoever of him, *D.*, on the estate and effects of *T. H.* *A. H.* then took out letters of administration of *T. H.*'s estate, and in order to pay the creditors, raised sums of money by annuities and mortgages on the said leasehold property, *R.* joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into farther arrangements with the creditors, and soon afterwards dissolved partnership, *R.* remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee-simple, and dealing with them as his own for several years, without any interference by *A. H.* or the said next of kin, or their husbands, who survived them—all of whom died between the years 1797 and 1815,—he (*R.*) mortgaged them in 1815, to secure debts due by him to *D.* and Co., subject to the leases possessed by the intestate; subject to which, he also in 1818 released to them the equity of redemption, and they afterwards sold the property in fee to other parties. A bill to redeem the premises was filed against the mortgagees and purchasers in 1831 by the administrator *de bonis non* of *T. H.*, claiming also as representative of the next of kin. There was no proof of the execution of a release in pursuance of the covenant by Sir *W.* and Lady *S.*, except that it appeared from their deceased attorney's bill-book that he had prepared such release:

Held, by the Lords, that it was immaterial whether such releases were executed or not, as the various acts of ownership exercised over the leasehold property by *A. H.* and by *R.* and those deriving under him, all dealing with it as their absolute property for a period of 37 years, with the acquiescence of the next of kin, and their representatives, established beyond all doubt an agreement by the next of kin to give up all their in-

AGREEMENT—continued.

terest in it, in consideration of the arrangements of 1790.

Semble, if the residue had not been so released, and time and the acts and acquiescence of the parties had not been a bar to a bill to redeem, the administrator *de bonis non* of the intestate would be entitled to sustain such bill, notwithstanding that the equity of redemption had been reserved to the original administrator's representatives, and not the administrator of *A. H.*, the former administrator.—*Skeffington v. Budd*, 9 Cl. & F. 219.

8. The appellant having claimed to be a partner with one *Paynter* in gas works, which the latter had erected, and was about to sell to the *East London Gas Company* then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that *Paynter* should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that *Paynter* should hold shares for the appellant to the value of 2,000 *l.* for two years. The company having been formed, and having purchased the gas works from *Paynter*, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before that decree was made, the company was dissolved, and the gas works were sold to the *Ratcliff Gas-light and Coke Company*. The appellant then filed a new bill against *Paynter*, the *Ratcliff Company*, the directors of the dissolved company, and the assignees of *Paynter* (who had become bankrupt), to establish a lien upon the gas works, for what should be found due to him under the former decree, as well to carry out the former decree against all these parties:—Held, by the House of Lords, affirming a decree of the Vice-Chancellor, that the sale of the gas works by *Paynter* to the *East London Company* was authorised by appellant's agreements; that he had no just claim against the company, or lien on the property, and that the supplemental bill was properly dismissed with costs, as against all the defendants except *Paynter* and his

AGREEMENT—*continued.*

assignees.—*Pinkus v. Ratcliff Gas-light and Coke Company*, 1 H. L. Cas. 309.

9. One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statutes of Frauds; but where the first paper was in these words, "I agree to let the premises in *G. L.*, containing three stables, &c., for the same rent, and subject to the same conditions that I hold them myself," it was held (*Lord Campbell, Lord Chancellor, diss.*), that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a sufficient memorandum of agreement to satisfy the statute.—*Fitzmaurice v. Bayley, Bart.*, 9 H. L. Cas. 78.

See *Peck v. The North Staffordshire Railway Company*, 10 H. L. Cas. 473.

ALIENATION. See ENTAIL, 1.

An entail contained a prohibition against alienation, with the usual irritant and resolute clauses, notwithstanding which it was declared, "that it shall be lawful and competent for the heirs of tailzie to set tacks of the said lands and estate during their own lifetime or the lifetime of the receiver thereof, the same being always set without evident diminution of the entail."

Held, that a lease for 97 years granted by an heir of entail, taking a fine thereon, fell within the prohibition against alienation.—*Montgomery and Others, Trustees of Queensberry (Duke) v. Wemyss (Earl)*, 2 Dow, 90.

See *Ker v. Roxburgh*, 2 Dow, 149; *Montgomery v. Charteris*, 5 Dow, 293.

"The *Queensberry* case settles the question as to the powers of an heir of entail to make a lease of this duration." *Per Lord Eldon (Chancellor)*, *Henderson v. Malcolm*, 2 Dow, 285, 288.

2. Entail (in 1648) of a very large estate, with prohibition against alienation, disposition, contracting debt, ordering anything in part of the tailzie and succession, in whole or in part, but with a power expressly

ALIENATION—*continued.*

reserved to the heirs of entail, "to grant feus, tacks, and rentals, of such parts and portions of the said estate as they shall think fitting, provided the same were made without hurt or diminution of the rental of the same lands and others, as the same should happen to pay at the time the said heir should succeed thereto." An heir of entail granted 16 feus of "parts and portions" of the estate, which 16 parts included the whole estate, with the exception of the mansion-house and 47 acres of land. He then executed deeds, all dated on the same day, by which the feued lands were entailed on a new series of heirs, with a reservation for his own life of the entire use and enjoyment of the estate by himself:

Held, affirming the decision of the Court of Session, that these grants were not in accordance with the power reserved in the deed of 1648, but were an alteration of the succession under it, and that the whole 16 feus were so connected together, as, in fact, to form one grant, and consequently all must be reduced together.—*Ker v. Roxburgh (Duke)*, 2 Dow, 149.

See *Lindsay v. Oswald*, L. R., 1 Sc. Ap., 106.

ALLUVION.

Lands formed slowly, gradually, and imperceptibly by alluvion on the sea shore, belong, by general immemorial custom, to the owner of the adjoining lands, and not to the Crown. So decided in the House of Lords, in concurrence with the unanimous opinion of all the judges.—*The King v. Yarborough (Lord)*, 1 Dow & C. 178.

AMBASSADOR, BRITISH, AT PARIS.

See EVIDENCE. MARRIAGE.

ANNUITY. See WILL. INCUMBRANCE. MARRIAGE CONTRACT.

W. C., by indentures dated in 1800, for the consideration of two sums of 2,000*l.*, granted unto *G. J.* two annuities of 300*l.* each, charged on his freshhold lands at *T. H.*; and the indentures contained powers of repurchase by *W. C.*, his heirs and

ANNUITY—continued.

assigns, on giving notice in writing under his or their hands, and paying all arrears.

In 1812 *W. C.* agreed to sell all his lands (including *T. H.*) to *W. B.*, for 90,528*l.*, and to convey free from incumbrances, except certain mortgages; and in pursuance of the agreement *W. B.* was let into possession, and paid large sums.

The annuities to *G. J.* being in arrear, in 1818 *W. C.* granted to him all his lands on trust, to sell them, and pay out of the proceeds, to relieve costs and incumbrances; and in 1824 *W. C.* assigned to *G. J.* the unpaid balance of the said purchase money, subject to prior charges, to apply the same in payment of what was stated in account to be due to *G. J.* Nothing was done on these deeds.

W. B. filed a bill in 1825 for specific performance of the agreements with *W. B.*, and for re-purchase of *G. J.*'s annuities, alleging that *W. C.*, at *W. B.*'s request, gave *G. J.* such notice as was required to enable *W. C.*, or *W. B.* in his place, to re-purchase the annuities, and that on the day in the notice mentioned, the agents of *W. C.* and *W. B.* went to *G. J.*'s residence to pay the principal and arrears, with costs, and to tender deeds of transfer for his execution, and *G. J.* being from home they left a notice that the money and deeds would remain for 10 days at the office of one of them. The bill prayed for a declaration that the annuities had ceased from that day.

G. J., by his answer, admitted the service of a notice, signed *W. C.*, by *E. C.* and *G. A. H.*, his attorneys, but insisted that they had no authority from *W. C.*, and that the notice was irregular and of no avail, as not being in pursuance of the powers of re-purchase:

Held, by the Lords (reversing the decree of the Vice-Chancellor and Lord Chancellor), that the annuities had not ceased, that the notice of re-purchase was not in strict pursuance of the power in the deeds, and was also defective in not naming a place for the payment of the

ANNUITY—continued.

money.—*Joy v. Birch*, 4 Cl. & F. 58.

See *Osborne v. Eales*, 2 Moo. P. C., (N. S.), 100; *Ponsford v. Hankey*, 3 De G., F., & J. 544; *Birch v. Joy*, 3 H. L. Cas. 565.

2. A testator gave his whole estate to trustees to sell, and, after payment of debts, expenses, and certain legacies, to pay out of the residue two annuities of 400*l.* each to *F.* and *P.*, and one of 200*l.* to *B.* for their respective lives. And for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities, and if the residue should not be sufficient, to vest whatever residue might be, and pay the dividends to the annuitants in the same proportions; and if more than sufficient, to vest the surplus and divide it, and the capital sums set apart for the annuities, as the same should become tangible by the death of each annuitant, among residuary legatees. *B.* predeceased the testator. The residue did not yield sufficient income every year to pay *F.* and *P.* 400*l.* each. On the death of *F.*, *P.* and *F.*'s personal representatives claimed payment of all the arrears out of the then enlarged income of the residue:

Held, by the Lords (varying interlocutors of the Court below), that *F.* and *P.* were entitled to payment of 400*l.* each only in those years in which the income of the residue was sufficient; that, when in any year that income was more than sufficient, the excess belonged to the residuary legatees; that on *F.*'s death half the capital of the residue became divisible among them, and then *P.* became entitled to the income in each year of the other half; but when in any year this income exceeded 400*l.*, the excess belonged to the residuary legatees, and neither *P.* nor *F.*'s representatives were entitled to any payment of arrears.

No benefit accrued to the residuary legatees from the lapse of the annuity to *B.*, except when thereby the income of the residue exceeded the amount of the two subsisting annuities.—*Casamajor v. Pearson*, 8 Cl. & F. 69.

ANNUITY—continued.

3. A lessee of a bishop's lands in *Ireland*, with a custom of renewal, granted sub-leases, with covenants to renew on payment of rents and fines. The sub-leases became vested in *R.*, who charged the lands, and other lands of which he was seised in fee, with annuities, and conveyed both descriptions of land to a trustee, to secure the annuities, with power, if they should be in arrear, to raise payments by sale or other means. *R.*'s interest in the leasehold and freehold lands was assigned to *Haig* in 1814, and the lease under the bishop had then become vested in him, and he obtained renewals of it. On a bill filed against him in 1815 by the annuitants, praying a sale for payment of arrears then due, orders and decrees were made, appointing a receiver of the rents and profits of all the lands, to pay the annuities thereout, and declaring them to be a first charge on both description of lands, and ordering a sale of part to pay the arrears, unless *Haig* should pay the same in six months. On a supplemental bill by the annuitants, stating that they had discovered that the sub-leases had not been renewed, and praying that *Haig* might be ordered to renew them, a decree was made ordering him to execute renewals on payment of the rents and fines due to him, the same to be a first charge on the lands in case of renewal; but if the annuitants should not pay the rents and fines, then their bill, as far as it prayed renewal of the sub-leases, to be dismissed with costs, and the freehold lands to be sold, subject to the annuities, for payment of the arrears. The annuitants declined to renew, finding the proceeds of the freehold lands, which were sold, a sufficient fund for their dividends:

Held (affirming decrees of the Court of Chancery), that the annuitants ought not to be compelled to renew the sub-leases, and that *Haig* was not entitled in justice, or in point of form, to be reimbursed by them personally, or out of the produce of the freehold lands, for the rents paid to them by the receiver out of the leasehold lands.—*Haigh v. Homan*, 8 Cl. & F. 320.

ANNUITY—continued.

See *Tommey v. White*, 1 H. L. Cas. 160.

4. By deed of annuity, in consideration of 9000*l.* therein stated to be paid to *L., E., M., and M.*, the said *L.* granted to Messrs. *D. and H.* an annuity or clear yearly rent of 1800*l.* for three lives, charged upon his estate; and *L., E., M., and M.*, covenanted to pay the said annuity or yearly rent, with a proviso for repurchase by them, or any or either of them. And they executed their joint and several bond and warrant of attorney to confess judgment on the bond, the judgment to be as a farther security for the annuity, and to be entered forthwith against *L. and E.*, but not against *M. and M.*, until default of payment, and execution not to be entered on the judgment against *L. and E.* until the annuity should be 40 days in arrear; and *E.*, for farther securing the annuity, agreed, in the event of not becoming purchaser of *L.*'s estate in 12 months, to assign at *L.*'s expense, a mortgage which *E.* held on it, and also to procure the guarantie of a competent person for payment of the annuity:

Held, by the Lords (reversing the decree of the Court below), that *E.* was a principal grantor of the annuity, and not a surety.

The question whether a person is principal or surety in the grant of an annuity, is to be determined by the terms of the instruments; no extraneous evidence is admissible for that purpose.—*Hollier v. Eyre*, 9 Cl. & F. 1.

See *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Owen v. Homan*, 4 H. L. Cas. 997; *Mausnell v. White*, 4 H. L. Cas. 1039.

5. A will contained these words:—"My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be in any way entitled to, shall produce to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum, for themselves and their children, and to my wife's mother an addition to any property she may possess, so as

ANNUITY—continued.

to make up to her, during her life, an annuity of 100*l.* per annum; said annuities, after the decease of my wife and her mother, to be equally divided among my three children, *William, Mary, and Julia Louisa*. All the rest and residue of my property and possessions I give and bequeath to my son *William*." At the time of the testator's death his daughters had no children:—Held, that the annuities thus created were perpetual annuities. The testator's daughter, *M.*, died, and after her death he made a codicil to his will, dividing her annuity between his two surviving children, but in other respects confirming the will. His wife's mother having died, he made a second codicil, in these words: "And in case my son *William* shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife and my daughter, *J. L.*, my remaining property shall then be equally divided between" two relatives named in the codicil, and their children:—Held, that these codicils did not alter the nature of the annuities given by the will to *Julia Louisa*.—*Stokes v. Heron*, 12 Cl. & F. 161.

See *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Conron v. Conron*, 7 H. L. Cas. 168; *Byng v. Byng*, 10 H. L. Cas. 173.

6. *B.* receives an annuity charged on an estate then held by *A.* for life. On the death of *A.*, *B.* comes into possession of the estate. *B.* is, within the terms of the 38th section of the Succession Duty Act (16 & 17 Vict. c. 51), "deprived" of such annuity, and is entitled, on a calculation of his liabilities under that Act, to an allowance, on account of the annuity of which he is deprived.—*Braybrooke (Lord) v. The Attorney General*, 9 H. L. Cas. 150. See also *The Attorney General v. Floyer*, Id. 477; *The Attorney General v. Smythe*, Id. 497.

APPEALS. See COSTS. PRACTICE.

1. It seems that where the order of the Appeal Committee is desired to be re-heard, the re-hearing cannot in strictness take place without notice.

Though a party may for convenience

APPEALS—continued.

sake be allowed to argue against the decision of an Appeal Committee without having given such notice, it must be on the understanding that he is to present a petition to be heard against the allowance of the petition of appeal.

The time limited by the Standing Order, 24th March 1726, for the presenting of petitions of appeal, begins to run from the enrolment of a decree of a court of equity, and not from the period when that decree was pronounced.

The enrolment does not relate backwards, so as to prevent, by the effect of relation, this construction of the Standing Order.

Where, therefore, a decree which had been pronounced in 1821 was not enrolled till 1836, the Appeal Committee received the petition of appeal, and the House confirmed its decision.—*Brooke v. Champenoune*, 4 Cl. & F. 247.

See *Beavan v. Mornington*, 8 H. L. Cas. 525; *Lambert v. Peyton*, 7 H. L. Cas. 423.

2. By the Standing Order of the House of Lords, of the 24th of March 1726 (No. 118), as amended in 1829, no petition of appeal from any decree or sentence of any court of equity in *England or Ireland*, shall be received by the House after two years from the enrolling of the same, and the end of the next session ensuing the said two years, unless the person entitled to such appeal be under the age of 21 years, or covert, *non compos mentis*, imprisoned, or out of *Great Britain or Ireland*, in which case such person may bring his appeal within two years after such disability ceased, and the end of the next session of Parliament ensuing the two years, but in no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or order appealed against:

Held, therefore, by the House of Lords (confirming the decision of the Appeal Committee), that an appeal lodged the 18th of February 1836, against a decree dated the 26th of April, and enrolled the 14th of June

APPEALS—continued.

1832, was irregular, as not being within time, although the appellant had been absent abroad in consequence of embarrassment and illness of his wife, and was advised and believed he might appeal at any time within five years from the date of the enrolment of the decree, and although his appeal had been received and appointed for hearing.

Held, however, that the said appeal was saved by being extended to subsequent orders in the same cause, the appeal from these orders being brought within two years from the enrolling of them.—*De Burgh v. Clarke*, 4 Cl. & F. 562.

See *Athwood v. Small*, 6 Cl. & F. 234; *Tomney v. White*, 3 H. L. Cas. 49; *Lambert v. Peyton*, 7 H. L. Cas. 423; *Beavan v. Mornington*, 8 H. L. Cas. 525.

3. An appeal on a mere point of practice is not competent.—*Ferrier v. Howden*, 4 Cl. & F. 25.
4. An order, on an application for suspension and interdict, is subject to appeal to the House of Lords, within the 48 Geo. 3, c. 151.—*Fleming v. Dunlop*, 7 Cl. & F. 43.
5. Orders made by the Lord Chancellor, by virtue of the 52 Geo. 3, c. 101, and the 5 & 6 Will. 4, c. 76, in the matter of charitable estates and funds, are subject to an appeal to this House.
Quære, whether such orders, if made under 5 & 6 Will. 4, c. 76, alone are subject to such appeal?—*Bignold v. Springfield*, 7 Cl. & F. 71.
6. An order made by the Court of Exchequer, on a report from the Remembrancer, pursuant to a reference to him in the matter of an extent, no bill being filed, is not the subject-matter of an appeal to the House of Lords.—*Wall v. The Attorney General*, 7 Cl. & F. 81, n.
7. An order of the Court of Chancery on an award, made between parties, upon a submission to a reference which was made a rule of court, according to Act of Parliament (10 Will. 3, c. 14), no bill being filed, is not subject-matter of appeal to

APPEALS—continued.

the House of Lords.—*O'Sullivan v. Hutchins*, 7 Cl. & F. 85, n.

8. A decree made by the Lord Chancellor, upon appeal to him from a decree made by the Commissioners, by virtue of the Act 43 Eliz. c. 4, for charitable uses, is subject to appeal to the House of Lords.—*Almsmen of Eastham v. Lady Kempe*, 7 Cl. & F. 101, n.
9. An order of the Court of Chancery, setting aside a purchase made under a decree in a cause, may be brought under the review of the House of Lords by a purchaser, although not a party to the cause.—*Bailey v. Maule*, 7 Cl. & F. 121, n.
10. Partners in a licensed distillery, convicted of a breach of the revenue laws, consented to a mitigated penalty, after payment of which, one of them brought an action against the others for indemnity, on the ground that he was innocent of their illicit acts. The defenders pleaded in defence that, as all were involved in the delict, no one could claim indemnity or contribution from the others. The Court gave no judgment on that defence, but sent the cause to trial by a jury; the judge's opinion was not taken on it at the trial, nor were exceptions tendered. The jury found a verdict that the defenders were indebted to the partner for the sum paid by him towards the penalty. The Court being afterwards moved, upon notice, "for a rule to show cause why the verdict should not be set aside and a new trial granted," refused "a rule to show cause why the verdict should not be set aside," and subsequently made orders applying the verdict, and decreeing against the defenders for payment by them jointly and severally, to the pursuer, of "the sum found by the verdict, with interest as libelled":
Held, that the order refusing to set aside the verdict and grant a new trial was not, but that the orders applying the verdict were, subject to appeal to the House of Lords.—*Campbell v. Campbell*, 7 Cl. & F. 166.

See *Re London and Eastern Banking Corporation*, 1 De G., F., & J. 32.

APPEALS—continued.

11. A Court of Appeal will not entertain an appeal for costs alone.

Quære, whether when an appeal has been presented on the merits, the Court will entertain a cross appeal on the question of costs?—*Horne v. Pringle*, 8 Cl. & F. 265.

12. The House of Lords will not hear an appeal against any decree or order of any branch of the Court of Chancery unless it has been enrolled.—*Andrews v. Walton*, 8 Cl. & F. 457.

See *Beavan v. Countess of Mornington*, 8 H. L. Cas. 525.

13. An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.—*Fleming v. Newton*, 1 H. L. Cas. 363.

See *Geils v. Geils*, 3 H. L. Cas. 280.

14. The circumstance that a person has been made a party to a suit in the court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.—*Rochfort v. Battersby*, 2 H. L. Cas. 388.

See *Wearing v. Ellis*, 6 De G., M., & G. 608; *Galbraith v. Cooper*, 8 H. L. Cas. 315; *Eyre v. McDowell*, 9 H. L. Cas. 619.

15. *Semble*, that a decree appealed from but not adjudicated on farther than by dismissing the appeal generally, may be included in a subsequent appeal.

Semble also, that the decrees and orders which have not been enrolled, may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause and duly enrolled.

Where one part of a decree has been appealed against and has been affirmed, that circumstance will not prevent an appeal being brought (if in due time) against another part of the same decree.—*Tommey v. White*, 3 H. L. Cas. 49.

16. A disallowance, by the Master, of a claim made under the Winding-Up Acts, is the subject of an appeal.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

APPEALS—continued.

17. The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, nor both combined, can create such a right, it being especially one of the limitation and extension of jurisdiction.—*The Attorney General v. Sillem*, 10 H. L. Cas. 704.

APPOINTMENT. See POWER.

APPORTIONMENT.

The Act 4 & 5 Will. 4, c. 22, for the apportionment of rents, annuities, and other periodical payments, extends to Scotland.—*Fordyce v. Bridges*, 1 H. L. Cas. 1.

APPRENTICE.

An apprentice to a barber in Scotland, bound by his indentures "not to absent himself from his master's business on holiday or week day, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's Sunday customers:

Held, by the Lords (reversing the interlocutor of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that that work and all other sorts of handicraft were illegal in England as well as in Scotland, not being work of necessity, or mercy, or charity.—*Phillips v. Innes*, 4 Cl. & F. 234.

APPROPRIATION.

Monies paid by debtors without specifically appropriating them, are to be applied in discharge of their oldest debts.—*Toulmin v. Copeland*, 2 Cl. & F. 681; 7 Cl. & F. 350.

ARBITRATION.

1. An arbitrator before whom a case had been long pending, desired, before he made his award, that both the parties should send him a written statement that they had no farther evidence to produce. He received a statement to that effect apparently signed by all the parties, and recited it in his award. It afterwards appeared that one of the parties had not signed

ARBITRATION—*continued.*

this statement, but had still material evidence to produce. The Court of Session refused to set aside the award:

Held, that the award could not stand.—*Sharpe v. Bickerdyke*, 3 Dow, 102.

2. Submission and decret arbitral in 1782 between *A.* and *B.*; the latter taking burden upon him for his son *C.*, a minor, whose interest was concerned. *B.* dies in 1789, and *C.* comes of age in 1794, and does various acts under the decret arbitral, believing it to be a *bonâ fide* submission and award. In 1809 *C.* discovers the uncorrected scroll of the submission, and letters of one of the arbiters, from which it appears that the arbiters had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties, so that the transaction was in reality an agreement to be carried into execution under the colour of an award:

Held, by the House of Lords (reversing the judgment of the Court of Session) that under these circumstances and upon this evidence, the transaction was not a valid decret arbitral, nor binding as such upon *C.*—*Maule v. Maule*, 4 Dow, 363.

See *Anderson v. Wallace*, 3 Cl. & F. 26; *Swinfen v. Chelmsford* (Lord), 5 H. & N. 906.

3. There may be circumstances in which an arbitrator being himself a competent judge of the subject, being chosen for that reason, and having no doubt in his mind upon the particular matter, may refuse to receive evidence on such matter, and such refusal will not vitiate his award.

Arbitrator in his award goes beyond the limits of the submission; this does not vitiate the whole award, but the excess may be held *pro non scripto*, and the award treated as good to the extent of the power.

Five parties agreed to refer the direction of certain extensive improvements and the apportionment among themselves of the expenses thereof, to an arbitrator, the submission being that the award was to be pronounced "betwixt and the day of

ARBITRATION—*continued.*

or between and any further day to which the submission may be prorogated, and which the arbitrator is hereby empowered to do at pleasure." The submission was signed by the appellant on the 11th, and by two of the respondents on the 14th March 1811. The work was begun immediately, and the arbitrator prorogated the submission on 8th November 1811, and again 2nd November 1812. Two other of the respondents signed the submission on the 20th March and 9th April 1813. The arbitrator made his award as to the payments in May 1813, the work being at that time completed. Upon an objection by the appellant on the ground of delay in making the award:—Held, that as the appellant had seen the work going on in the interval between 1811 and 1813 without making any objection, he must be considered to have waived it, and could not take it after the completion of the work.—*Johnston v. Cheape*, 5 Dow, 247.

See *Sharpe v. Bickerdyke*, ante, 3 Dow, 102; *In re Hawley*, 2 De G. & Sm. 43.

4. It is no objection to an award that the arbitrators have, in the absence of one of the parties, called in the other, and have asked him whether he admitted or disputed certain items in an account, and have merely taken his answer to that question.

Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such a person in deciding on the partnership accounts. The arbitrators by adopting in terms the opinions of such person do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account.—*Anderson v. Wallace*, 3 Cl. & F. 26.

See *Whitmore v. Smith*, 7 H. & N. 514; *Haigh v. Haigh*, 3 De G., F., & J. 161; *Thorburn v. Barnes*, L. R., 2 C. P., 395.

5. *A.* gives bond and judgment to *B.* for the balance of an account. *B.* assigns the judgment to *C.* Submission by

ARBITRATION—*continued.*

A. and C., and award that C. is entitled to the benefit of the judgment. Bill filed by C. to enforce the award. Objection by A. that the judgment was given to B. for a much larger sum than was really due, and upon an understanding that it was to stand only as a security for what was actually due; that the award had been made in his absence, and that the arbitrators had not given him credit for several sums which he had paid to B. on account of the judgment. Evidence that these objections had been stated before the arbitrators by his counsel and solicitors:

Held, affirming the judgment of the Court below, that C. was entitled to judgment for the whole sum.—*Hill v. Ball*, 1 Dow & C. 164.

6. Two parties treating for a lease, agree by articles in writing that the amount of rent shall be settled by arbitration; the arbitrators in case they disagreed, to have power to call in a third party, and his decision with that of one of the arbitrators, to regulate the rest. The arbitrators disagree, and an umpire is appointed. He, in making his valuation, takes into account an agreement made with himself by the lessee, to lay out a considerable sum in repairs, which agreement or obligation the lessor, by the original agreement between the parties, has no power to enforce. The arbitrator for the lessee agrees to the valuation, not as the result of his own judgment, but after consulting the lessee, and at the instigation of the lessee's wife:

The Lords, reversing the decree of the Court below, held that specific performance ought not to be granted.—*Chichester v. McIntyre*, 1 Dow & C. 460.

7. An award, by the law of *Scotland*, although it does not decide on the whole matter referred, may be good as far as it goes, provided it be unobjectionable in other respects.—*Macellan v. Macleod*, 2 Dow & C. 121.
8. By Act of Parliament, authorising a joint-stock company to raise 80,000 l. in shares of 25 l. each, the directors were empowered to make such calls for money on the subscribers to the undertaking as they should from time

ARBITRATION—*continued.*

to time find necessary for the purposes of carrying on the same, but no such call should exceed 10 l. per cent., and one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two calls made on his shares, on the same day, and that subscriber brought a counter-action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the company's undertaking, and at last abandoned that undertaking and united themselves with another company. Both actions were referred to an arbitrator under an order of Court; and he found, *first*, that the directors were entitled to decree for the amount of the two calls, with interest; *secondly*, that the subscriber was entitled to decree for a certain sum as the ascertained price of his shares, which sum, under deduction of what was awarded for the calls, he was entitled to recover from the company on surrendering or transferring his shares to them, or to any person they might direct; and he farther found that the directors were entitled to reservation of any claim they might have against the subscriber for calls made subsequent to their action, and that the subscriber was entitled to reservation of his defences against such claims:

Held, by the House of Lords, that the award was bad, inasmuch as the first finding for the amount of the two calls made in one day was contrary to the Act of Incorporation, which required the distance of a month at least between two calls, and the second finding was not final and conclusive, but held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.—*Baillie v. The Edinburgh Oil &c., Company*, 3 Cl. & F. 633.

Semble, the third finding, reserving subsequent claims of one party and defences of the other thereto, was not bad (though unnecessary), inasmuch as a reference of "all questions between the parties," by the practice in *Scotland*, is confined to the questions in the particular actions re-

ARBITRATION—continued.

ferred.—*Baillie v. Edinburgh Oil Gas-light Company*, 3 Cl. & F. 639.

A submission, by a woman, to arbitration, is revoked by her marriage before the award is made.—*McCan v. O'Ferrall*, 8 Cl. & F. 30.

ARCHDEACON. See **CHURCH**, 3.

ARMY. See **MARRIAGE**.

ARMY AGENT.

Information under the 45 Geo. 3, c. 58, at the suit of the crown against an army agent, for a discovery and production of documents, with a view to an account. Plea 1st., that the accounts had been settled and closed at the War Office by the issuing of the clearing warrants. The warrants were set out. 2nd., that the monies imprested in the agent's hands for the pay or arrears of pay of officers, were held by him as the banker or private agent of the officers by whom he was appointed; and that for such monies he was not accountable to the crown. The plea was ordered by the Court below to stand for an answer, with liberty to the Attorney General to except:

Held, by the Lords, that both parts of the plea were bad, for the clearing warrants did not purport on the face of them to be final settlements of account; and that an army agent was a public officer, and was accountable to the crown for monies received by him for the pay and arrears of pay of officers. The plea might have been overruled, but as it was allowed to stand as an answer, the appellant could not complain of that. Judgment affirmed.—*Deare v. The Attorney General*, 2 Dow & C. 377.

ARREST OR APPREHENSION.

A private person is not justified in assisting, or giving in charge to a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.—*Price v. Seeley*, 10 Cl. & F. 28.

ASSAULT.

In an action against several persons

ASSAULT—continued.

for an assault (brought in the Court of Session), the pursuer's statement set forth two previous assaults, in which only some of the defenders were concerned. The Court admitted proofs of these assaults, and gave judgment for a sum, by way of damages, against all the defenders conjointly and severally. The judgment then went on to declare that, whereas one of the defenders was a justice of the peace, the Court remitted the case to his Majesty's Advocate to consider how far it was proper that he should continue in that office:

(*Senble*, per Lord Eldon (Chancellor), that in Scotland evidence of the previous assaults might be admissible to show malice and premeditation).

Held, that as there had been no complaint addressed to the court below as to giving judgment for all the damages against the defenders, conjointly and severally, that matter could not be raised on appeal;—and

Held, that the remit to the King's Advocate with reference to one of the defenders being a justice of the peace, was not regularly a part of a judicial decision, and must be itself remitted to the court below for reconsideration.—*Macdonnell v. Macdonald*, 2 Dow, 66.

See the observations of Lord Eldon in a subsequent case (*Henderson v. Malcolm*), 2 Dow, 285, on this remit.

ASSIGNMENT.

1. *A.* and *B.* carried on business in partnership; they were also members of a firm which traded as *C. & Co.* *A.* and *B.*, for the purpose of paying off certain of their debts, assigned to the other members of the firm of *C. & Co.*, portions of their shares in that firm. The assignment, which was *bonâ fide*, was regularly intimated, and it was duly entered in the books of the firm. An extent at the suit of the crown afterwards issued against *A.* and *B.*:

Held, that the portions of shares thus assigned could not be seized under the extent.—*Spears v. The Advocate General*, 6 Cl. & F. 180.

2. By a settlement made on the marriage of *A.*, certain premises were assigned

ASSIGNMENT—continued.

to trustees for his use for life, and power was also given to him "to raise by deed, mortgage, or any other writing, a sum of 1000 l., to be applied to any purpose that the said A. should please, but the same was not to be raised by way of sale of the said lands:" and A.'s wife had a jointure secured on these premises. A. raised the 1000 l. by mortgage of the settled premises, and afterwards became bankrupt. His assignee sold his interest, as such assignee, in the settled premises to W. B., who also purchased the mortgage; A. afterwards died:

Held, that by the assignment of A.'s estate and interest in the premises, B. became entitled to hold the mortgage as a first charge upon the estate, as well after as before the death of A., and until by payment of principal and interest it should be satisfied.—*Simpson v. O'Sullivan*, 7 Cl. & F. 550.

3. A. executed a deed conveying and assigning his property to trustees, for the benefit of creditors. The operative part of the deed was in these words:—"All and sundry superiorities, lands, and heritages, debts heritable and moveable, and whole goods, gear, sums of money, and effects; and in general my whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, presently belonging to me:"

Held, that these words did not pass the profits of a public office at that time filled by the grantor.

Semble, that the profits of a public office cannot be assigned for the benefit of creditors, *Hill v. Paul*, 8 Cl. & F. 295.

4. A testator in *Scotland* gave all his property to trustees; first, to pay his debts; secondly, to pay Mrs. R., a married woman, so much of the annual proceeds as they might deem necessary for support of her and family during her life, declaring the same to be alimentary and exclusive of her husband, not attachable, nor assignable, nor subject to any debts or debts of her or her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust pro-

ASSIGNMENT—continued.

perty; first to pay debts affecting it; secondly, to pay part of the rents to Mrs. R. for aliment; thirdly, to apply the residue in payment of the debts due to the assignee:

Held, that the assignment was void on three grounds, viz.:—

1. It was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment.

2. The rule of law in *Scotland*, requiring the concurrence of the husband in his wife's deed, could not be dispensed with by his absence abroad at the time, for a temporary purpose only.

3. The assignment was void, as it violated the express prohibition against alienation; and in this respect the law in *Scotland* is the same as in *England*.—*Rennie v. Ritchie*, 12 Cl. & F. 204.

5. Under the 9 Geo. 2, c. 5 (*Irish statute*), payment by the conusor of a judgment, to the conusee, without notice of the assignment of the judgment, is payment to the assignee thereof. The registration of the assignment under that statute does not operate as notice to the conusor. The situation of a conusor under this statute resembles that of a mortgagor under the (*English statute*) 32 Hen. 8, c. 34.—*Boyle v. Ferrall*, 12 Cl. & F. 740.

6. The assignee of a chose in action or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognisant of them. It is his duty to make inquiries; and as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make inquiries, and who has not made them.—*Mangles v. Dixon*, 3 H. L. Cas. 702.

But if the notice by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is

ASSIGNMENT—*continued.*

bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself.—*Mangles v. Dixon*, 3 H. L. Cas. 702.

The performance, by the creator of a security, of any intermediate stipulation in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never, in itself, be considered as a ground for fixing him with a liability for something beyond that by which he is equitably bound.—*Id.*

A. was the owner of a vessel. *B.* was to charter it for a particular voyage, to seek a particular cargo. Its tonnage was larger than *B.* required. *A.* was willing to undertake half the risk, and was to have half the profits. A charterparty was executed on the 24th April 1845, by which the vessel was declared to be let to freight at 16*s.* per ton per month to *B.*, and bills were to be given and payments from time to time made, by *B.*, which taken together would cover one half the amount stipulated for the freight. On the arrival of the ship at home, *B.* was to give a bill at 90 days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which *A.*'s clerk was to join in the adventure, and "after payment or deduction of the freight, and all incidental expenses, the profit or loss" was to be borne by the parties in equal moities; and by the other, *A.* gave to *B.* a guarantee for the due performance, by the clerk, of the stipulations he had entered into. On the 1st of December 1845, while the ship was on the voyage, *A.* assigned to *C.* the charterparty, and wrote on the margin thereof a note addressed to *B.* requesting him to pay "what is due." *C.* gave *B.* notice of this assignment and note. The notice was in the ordinary form, and no inquiries were made. *B.* continued the payments which, by the stipulations in the charterparty, he was bound to make. The vessel returned in August 1846,

ASSIGNMENT—*continued.*

and the adventure turned out a loss. *B.* claimed, as against *C.*, to balance the accounts of profit and loss, as he would have been entitled to do with *A.* had the charterparty not been assigned:

Held, that in equity he was entitled to do so.—*Mangles v. Dixon*, 3 H. L. Cas. 702.

ATTAINDER. *See* PEERAGE.ATTORNEY AND CLIENT. *See* INTEREST. PRACTICE.

1. An attorney may contract with his client, provided no advantage is taken of the confidential relation. If he is employed to sell, and choose to deal for the estate to be sold, he must withdraw from the connection, or put himself completely at arm's length, and show, if the contract should be questioned, that he has given the same advice for the benefit of his client as he would have done if the sale had been to a third party. If employed as a general land agent he is bound, if he purchases any of the estates in respect of which he is agent, to communicate to his principal all the knowledge acquired by him as agent, of the real value of the estate. But the mere circumstance of his being attorney does not prevent his entering into a valid contract with his client. Therefore, a decree of the Irish Court of Exchequer, dismissing a bill for specific performance of a contract, on the mere ground that it was one between attorney and client, was reversed on appeal.—*Cane v. Lord Allen*, 2 Dow, 289.

See Bank of London v. Tyrrell, 10 H. L. Cas. 34; *Low v. Holmes*, Cas. temp. Nap. 290-310.

2. A trust fund of 15,000*l.*, created under a marriage settlement, by which certain lands were limited to the husband for life, remainder to the first and other sons in tail, with a power to the husband of leasing for 41 years or three lives, at the best rent, was directed by the deed to be laid out with all convenient speed, in the purchase of lands in fee simple, to be conveyed and limited to the same uses as the other

ATTORNEY AND CLIENT—*continued.*

lands mentioned in the settlement; and in the meantime the trustees were empowered, with the consent of *Phayre*, to lend out the money on any public or private security. The husband purchased a leasehold interest for 8911*l.*, of which he took the assignment for himself alone, and obtained from the trustees, out of the trust fund, money to complete the purchase, and for other purposes, to the amount in all of 11,696*l.*, as a security for which they took a mortgage of the leasehold interest, and a collateral security for 1310*l.* amounting, with the purchase money, to 10,221*l.*, being upwards of 1400*l.* less than the sum advanced out of the trust fund. The husband granted a lease, at a great under-value, for his own term, of part of the purchased lands, to the attorney who managed for him, which purchase turned out a very beneficial one:

Held, by the House of Lords, reversing a decree of the *Irish Exchequer*, that the first son of the marriage was entitled to follow that part of the trust fund which had been misapplied, and to have the lands sold discharged of the lease to the attorney, whose equity against him (the son), as personal representative of his father, was barred by notice of the settlement and breach of trust.—*Phayre v. Representations of Peree*, 3 Dow, 118.

See *Bentley v. Robinson*, Cas. temp. Nap. 599.

3. An attorney and agent advanced money to his client and principal from 1773 to 1778; accounts were taken, and securities given for the sums found due. In 1783 these accounts were impeached:

Held, that the accounts must be treated as open, and the impeached transactions sifted; the securities not to be admitted as proofs of what was actually due, but the proof of the sums advanced and due to be shown by other evidence.—*Morgan v. Lewes*, 4 Dow, 29.

But, as from the lapse of time vouchers might have been lost, the statement of the attorney on oath was to be received in evidence as to the existence

ATTORNEY AND CLIENT—*continued.*

and import of such vouchers.—*Morgan v. Lewes*, 4 Dow, 29.

An attorney procured for his client an advance of money from other clients. The money was secured by mortgage. The attorney was in possession, as agent for the mortgagees (who had been included as parties), and a separate account was ordered as to the money actually advanced on mortgage, to which the separate account was confined, and to which the mortgage security was cut down. There had been separate transactions between the mortgagor and the mortgagee as to which a bond had been given; and these transactions were set forth as part of the consideration for the mortgage. These transactions were ordered to form part of the general account.—*Id.*

Timber felled on the estate, held to be taken as part of the produce going in discharge of the mortgage account, and therefore not capable of being taken in execution by the attorney in satisfaction of his private debt.—*Id.*

See *Gresley v. Mausley*, 3 De G., F., & J. 433.

4. An executor, who was himself an attorney and solicitor, conducted suits relating to the estate in his professional character. Under a bill by the family of the testator for an account, the Master reported that the suits were properly commenced (though without the knowledge of the family), but were negligently and tardily prosecuted:

Held, that in taking the accounts, the costs of the suits were not to be allowed in the first instance to the executor.

Held also, there having often been monies in the hands of the executor, that the accounts were to be taken by making rests at the end of each year, striking a balance charging the executor with interest on such balance, and applying the interest that might be found due from him in each year, in the first place, towards his future payments, before any application was made of the principal money.—*Willson v. Carmichael*, 2 Dow & C. 51.

ATTORNEY AND CLIENT—*continued.*

5. *F. C.*, tenant for life, with power to lease for 31 years, and *M. C.* his son, tenant in tail. *F. C.* makes a lease of the lands to *O.*, his attorney, for three lives, of which *M. C.* is named as one. *M. C.*, while an improvident young man, executes an agreement, written on the counterpart of the lease in the hands of *O.*, by which, in consideration of 20*l.*, he confirms the lease granted by his father, and engages to renew it for an additional three lives. The agreement is dated in 1749, and the first three lives expire in 1817, and then the representative of *O.* claims from the representative of *M. C.* a renewal for other three lives, pursuant to the agreement, and files his bill for specific performance. The bill is dismissed; for the agreement is of too doubtful and suspicious a character for a specific performance, and the time elapsed under circumstances which did not imply acquiescence. The judgment affirmed in *Dom. Proc.*—*Blakeney v. Baggott*, 1 Dow & C. 405.

6. A law agent in *Scotland* employed to prepare a heritable bond, prepared it in such a form as to constitute a public holding, which requires the confirmation of the superior. He neglected to obtain that confirmation. The grantee thereby lost the money he had advanced:

Held, by the Lords, affirming a judgment of the Court of Session, that the law agent having chosen to depart from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, he was bound to make good the loss.

Secus, if instead of being common practice it had been a new and difficult point of law.—*Stevenson v. Rowand*, 2 Dow & C. 104.

7. An agreement of partnership was made between two solicitors, one of whom could only practice in a superior, the other only in an inferior, Court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world:

ATTORNEY AND CLIENT—*continued.*

Held, that such an agreement is void, for a Court cannot suffer statements to be made, and papers presented to it, by parties who are neither parties to the cause, nor their lawfully authorized agents, and who are consequently not properly responsible to the Court for their conduct.—*Gillilan v. Henderson*, 2 CL & F. 1.

8. On a contract for the sale of *part* of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the *whole* of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death, the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery upon that verdict decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, farther held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the consor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a Court of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional igno-

ATTORNEY AND CLIENT—continued.

rance or neglect, to the prejudice of that person.—*Bulkley v. Wilford*, 2 Cl. & F. 102.

See *Power v. Power*, Cas. temp. Nap. 278; *Walker v. Power*, Id. 683; *Wright v. Wilkin*, 2 B. & S. 102.

9. A.'s interest in leasehold lands having been set up for public sale, under writs of *fi. fa.*, C., his attorney, who was the real plaintiff in one of the writs, but not pressing the sale, attended, and, having made the largest bidding, was declared the purchaser, and paid the purchase money, which was not more than sufficient to satisfy the writs prior to his own and the expenses. A. claimed the benefit of the purchase, alleging that C. bid as his agent, and purchased in trust for him, which C. denied, but offered to give up the purchase if A. would pay him the purchase money, and other demands he had on him. A. was not then able to raise the money, but, after ten years, during which C. dealt with the lands as his own, he filed his bill, charging that C. bid for and purchased the lands as his agent in trust for him; that C. said so at and after the sale, in conversation with friends of A., and that they, on that understanding, did not bid; all which C. positively denied in his answer. S., a witness for A., proved conversations between himself and C., as charged in the bill:

Held—1. That a decree, by which the bill was dismissed upon C.'s undertaking to release A. from all demands, and a second decree, by which the former was varied, and an issue directed to ascertain the value of A.'s interest in the lands at the time of the sale, were both erroneous.

2. That an inquiry as to such value was immaterial; the material question being whether C. was acting on behalf of A. in bidding for and purchasing his property, C. might take an issue to try that question; but if he declined, he should be declared a trustee for A.

3. That A.'s equity against C., if C. was acting on his behalf, was not affected by the lapse of ten years, there being no acquiescence by A., and C. being aware of his rights.

ATTORNEY AND CLIENT—continued.

4. That if an attorney is not acting as attorney for his client on a particular occasion, he may on that occasion throw off that character and exercise his independent rights.—*Austin v. Chambers*, 6 Cl. & F. 1.

10. In undertaking a client's business, an attorney or agent in *England* or *Scotland* undertakes on his own part for the existence and the due employment of skill and diligence. Where an injury is sustained by his client in consequence of the absence of either, he is responsible to his client for such injury.

Where, therefore, masters employed an attorney to take proceedings under a statute against their apprentices for misconduct, and the attorney specifically proceeded on the section of the statute which related to servants, and not to apprentices, and so occasioned the failure of the proceedings, and subjected the masters to damages:

Held, that this was an instance of such want of skill or diligence as to render the attorney liable to repay to his clients the damages and costs occasioned by his error.

The fact that, in the first instance, the magistrates proceeded to convict on the wrong section, furnished no excuse to the attorney for founding his proceedings upon it.—*Hart v. Frame*, 6 Cl. & F. 193.

See *Chapman v. Toll*, 8 E. & B. 396.

11. It is to be assumed that legal advisers, in discharge of their duty to their client, will investigate suspicious transactions, and satisfy themselves, before giving their approval of such transactions, that it is for their client's benefit to confirm them.—*Montmorency v. Devereux*, 7 Cl. & F. 188.

See *Hannah v. Hodgson*, 30 Beav. 23.

12. An attorney, who was the ordinary attorney for a borrower, also acted in the matter of a particular loan for the lender, but did not make any charge against the lender for

ATTORNEY AND CLIENT—*continued.*

his services. The security he took was not sufficient :

Held, that he was properly charged as an attorney acting on the retainer and employment of the lender, and was in that character liable to an action for damages for the loss suffered through the insufficiency of the security.—*Donaldson v. Haldane*, 7 Cl. & F. 761.

See *Purves v. Landell*, 12 Cl. & F. 91.

After the death of the lender, two of his sisters, by an arrangement with the rest of the family, who were the legatees of the lender, became possessed of the security, and applied to the attorney to do what was necessary. The means taken to secure the repayment of the loan on this continuation of it were insufficient :

Held, that as representing the interest of the deceased, and on their own account, the sisters were entitled to compensation from the attorney.—*Id.*

13. The law agent of *A. H.* was intrusted by him with a paper which purported to be a declaration of marriage between *A. H.* and *M. C.*, and was desired, in case of his death, not to let it pass into any hands but those of *A. H.*, and in case of *A. H.*'s death to preserve it for *M. C.*, to whom, from the other circumstances of the case, the existence of the paper appeared to be known. The law agent was, under these circumstances, equally the agent of the wife as of the husband, for the purpose of the custody of this paper.—*Hamilton v. Hamilton*, 9 Cl. & F. 327.

See *Bell v. Graham*, 13 Moo. P. C. 258.

14. An attorney or law agent is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services. A declaration or a summons against an attorney or a law agent, to recover damages for loss occasioned by his mis-manage-

ATTORNEY AND CLIENT—*continued.*

ment of a cause, must charge gross ignorance or gross negligence, or must at least contain allegations of fact from which the inference is inevitable, that the defendant has been guilty of one or the other. The law as to both these matters is the same in *England* and in *Scotland*.—*Purves v. Landell*, 12 Cl. & F. 91.

15. When a defendant, who is himself a solicitor, by a mistake in practice allows an account to be taken against him in a particular form without objection, he is not entitled to have the accounts reopened.—*Wallace v. Patton*, 12 Cl. & F. 491.

16. If an attorney or agent can show that he is entitled to purchase property, notwithstanding his character of attorney or agent, yet, if instead of openly purchasing it, he purchases it in the name of a third person, who acts as his trustee or agent, without disclosing the fact, such purchase is void.—*Lewis v. Hillman*, 3 H. L. Cas. 607.

17. There is no obligation on an attorney or solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person.—*Shaw v. Neale*, 3 H. L. Cas. 607.

An attorney or solicitor has no lien on an estate recovered for a client in respect of the cost and expenses incurred in recovering it. (*Barnsley v. Powell*, Ambl. 102, overruled.) He has a lien only on the papers in his hands.—*Id.*

An attorney held an assignment of two terms to attend the inheritance of an estate recovered by him for his client. On a rule being made to tax his costs, it was part of the rule that the Master should decide whether, and if so, upon what terms, the attorney should execute to his client assignments of these terms. The Master having made his *allocatur*, directed that the attorney should, on payment of what

ATTORNEY AND CLIENT—continued.

was due, or on security for the same being given to his (the Master's) satisfaction, execute assignments of these terms at the cost of the client :

Held, that this did not constitute a charge on the estate so as to give the attorney a priority from the date of the *allocatur* ; for that the Master had no power to direct that these terms should stand as a security for the amount of the costs.—*Id.*

ATTORNEY GENERAL. See PEERAGE.

1. The Attorney General of *England* has precedence over the Lord Advocate of *Scotland* in all matters in which they may appear together as counsel at the bar of the House.

The case of the *Attorney General and the Lord Advocate*, 2 Cl. & F. 481.

[See an Order of Precedence as to the Attorney and Solicitor General and "the two ancientest of our Sergeants-at-Law," issued by the Prince Regent in 1814, 2 Cl. & F. 483, n.]

2. Where the Attorney-General having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred.—*St. Mary Magdalen College v. The Attorney General*, 6 H. L. Cas. 189.

AUCTION.

1. An estate was to be sold by auction. The agent of the owner attended at the time and place of the intended sale, and mentioned the upset price. No sale was at that moment effected. the biddings not going so high as the price named. The agent then gave notice of his readiness to treat for a sale by private contract. Several persons then present went with him into a private room, and he, undertaking to let the estate go to the highest bidder. Seven of these persons made him offers. He took the highest offer :

Held, that this was, under the 17 *Geo.* 3, c. 50, and the 19 *Geo.* 3, c. 56, a sale by auction.—*Walker v. The Advocate General*, 1 Dow, 111.

2. A trader, seised in fee of real estates,

AUCTION—continued.

first mortgages them, and then conveyed them to trustees, in trust to pay off incumbrances, and for other purposes. He then became bankrupt, and the estates, including all interests, were sold by auction, by order of the assignees, with the concurrence of the trustees. It did not appear whether the mortgagees were at all consulted in the matter :

Held, by the Lords (affirming judgments in the Courts of Exchequer and Exchequer Chamber), that the estates so sold were estates of the bankrupt, and as such, exempt from payment of the auction duty under the acts 19 *Geo.* 3, c. 56, s. 19, and 6 *Geo.* 4, c. 9, s. 16.—*Attorney General v. Winstanley*, 2 Dow & C. 302

3. The practice of opening biddings (which is one of doubtful advantage) is not applicable to a sale of property by private contract.—*Barlow v. Osborne*, 6 H. L. Cas. 556.

Property was directed to be sold by the Court of Chancery. The advertisement announcing the sale, described it as a "sale by private contract." The sale was to be made subject to receiving the sanction of the Vice Chancellor, and subject to certain conditions, among which were these : that persons intending to purchase were to send in sealed tenders, which would be opened by the chief clerk to the Vice Chancellor, under whose order the sale was made : that the chief clerk, after the lapse of four days, would certify who was the purchaser ; and that this certificate was "in due course to be signed and filed, and become binding without farther notice or expense to the purchaser :"

Held (affirming the order of the Court below), that though this was described as a "sale by private contract," it had all the incidents of a sale by auction (*Dub. Lord Brougham*), and therefore that the practice of opening biddings might be applied to it.—*Id.*

Under the new practice introduced by the 15 & 16 *Vict.* c. 80, ss. 32, 33, 34, and the General Orders of the Court of Chancery of July 1851, (and Nos. 49-51) of October 1852, the contract

AUCTION—continued.

in a sale of this kind, does not become absolutely binding until after a lapse of eight days from the filing of the certificate. Within that period an application may be made for an order to open the biddings.—*Barlow v. Osborne*, 6 H. L. Cas. 556.

Such application may be made by a person who is not a "party to the proceedings."—*Id.*

A purchaser who has received back his deposit, under an order to open biddings, is not thereby precluded from objecting to such order.—*Id.*

Quare, whether a sale by auction and a sale on sealed tenders can be considered as identical?—*Id.*

AUTOGRAPH WILL. See **WILL**, 6, 7, 8.

In construing the autograph will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear and definite meaning can be struck out.—*Hall v. Warren*, 9 H. L. Cas. 420.

BAIL. See **ESCAPE**.

In an action for wrongful imprisonment, founded on the *Scotch* statute 1701, c. 6, the date marked on the petition praying to be admitted to bail, is not to be treated as conclusive evidence of the time at which the petition was actually declared, but proof of the real date of the delivery is receivable.

The provisions of the 39 *Geo.* 3, c. 49, do not affect those provisions of the Act of 1701 as to the time within which bail, in bailable cases, must be cognosed; the only alteration made is as to the amount of bail to be demanded.

The provisions of the Act of 1701 cannot be treated as repealed by inference or implication.—*Andrew v. Mardoch*, 2 Dow, 401.

BALLOT. See **MILITIA**, 1.**BANK AND BANKERS.** See **LIEN**.

1. A partnership consisting of more than six persons, carrying on the business of bankers in or within 65 miles of London, cannot, without violating

BANK AND BANKERS—continued.

the Acts of Parliament respecting the Bank of England, accept, in the course of such business, a bill of exchange payable at less than six months from the time of such acceptance.—*Booth v. The Bank of England*, 7 Cl & F. 509.

Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.—*Id.*

A London Joint Stock Bank, consisting of more than six partners, entered into an agreement with a bank in Canada, that G. P., manager of the London Joint Stock Bank, but not a partner therein, should accept bills drawn on him by the Canada bank, payable at less than six months from the acceptance thereof; and that the London Joint Stock Bank would provide funds for the due payment of such bills; the money transactions arising thereupon being in the accounts between the two banks, to be treated as transactions between the said banks:

Held, by the Lords (affirming the judgment of the Master of the Rolls),

1. That the acceptance of such bills in execution of such agreement, was unlawful, regard being had to the acts in force respecting the Bank of England.

2. That such acceptances would not be lawful, even if the London Joint Stock Bank, at the time of the acceptances, had in hand funds on account of the bank in Canada equal to the amount of the bills so accepted.

3. That the acceptances of such bills would not be lawful if the London Joint Stock Bank had not, at the time of the acceptances, any funds in hand belonging to the bank in Canada, but the bills were accepted on the credit of a contract by that bank to remit funds to meet such acceptances before the bills became payable.

4. That the Bank of England might maintain an action against the London Joint Stock Bank, founded on such transactions.—*Id.*

(See now 7 & 8 *Vict.* c. 32, s. 26.)

BANK AND BANKERS—continued.

2. *M.* employed *R. & Co.*, bankers in *Edinburgh*, to obtain for him payment of a bill drawn on a person resident at *Calcutta*. *R. & Co.* accepted the employment, and wrote promising to credit him with the money when received. *R. & Co.* transmitted the bill in the usual course of business to *C. & Co.* of *London*, and by them it was forwarded to *India*, where it was duly paid, by the person on whom it was drawn, to the *Indian* house. *R. & Co.* wrote to *M.*, announcing the fact of its payment, but never actually credited him in their books with the amount. The house in *India* failed :

Held, that *R. & Co.* were the agents of *M.* to obtain payment of the bill ; that payment having been actually made, they became *ipso facto* liable to him for the amount received ; and that he was not called upon to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed.—*Mackerny v. Ramsay*, 9 Cl. & F. 818.

See *Bourne v. Galliffe*, 11 Cl. & F. 45; *Cooper v. Slade*, 6 H. L. Cas. 798.

3. The relation between a banker and customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the drafts of customers, and that relation is not altered by an agreement by the banker to allow interest on the balances in the bank. The relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the relation between principal and factor or agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent :

Held, therefore, that an account between bankers and their customer, not long nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity.—*Foley v. Hill*, 2 H. L. Cas. 28.

4. Trustees of a charity in *Dublin* incorporated by Act of Parliament, and having a common seal, possessed

BANK AND BANKERS—continued.

stock in the public funds, which stock was in *Ireland*, registered in the Bank of *Ireland*. *G.*, the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney, prepared in different years, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the bank, and the stock was transferred. The facts were afterwards discovered, and *G.*, the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorised *C.* to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal ; the judge who tried the cause, told the jury that if under these circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the bank. On exceptions for this direction :

Held, that it was wrong.—*Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. Cas. 389.

See *Swan v. The North British Australian Company*, 7 Hurl. & N. 603 ; 2 Hurl. & C. 175.

BANKRUPTCY AND INSOLVENCY.

See CORPORATION, 17.

1. An *English* commission passes personal property in all parts of the world.

An assignment under an *English* commission of bankrupt vests in the assignees *ipso jure*, and without the necessity of intimation, the whole of the bankrupt's personal or moveable property in *Scotland* ; and the effects of all subsequent diligence by any *Scotch* or other creditor is thereby prevented. Thus, where a commission issued in *England* against a person, part of whose property consisted of certain shares of *Carron* Stock, in *Scotland*, and a creditor in *Scotland* afterwards arrested those shares :

Held, affirming the judgment of the

BANKRUPTCY, &c.—*continued.*

Court of Session, that the title of the *English* assignees was preferable.

There is no authority given by the *English* bankrupt statutes to compel a creditor to convey his *Scotch* property to the assignees.—*Selkirk v. Davies*, 2 Dow, 230.

2. A trust deed for the benefit of *Scotch* creditors, made by one of three partners in two *Scotch* firms, all of whom are also partners in *English* firms, is not such an act, in the ordinary course of the partnership business, as to be valid against the other two partners or their representatives; and the assignees under a general commission against all, cannot homologate it.—*Douglas v. Brown*, 2 Dow & C. 171

3. The *Stirling* Banking Company, in 1825, stopped payment, and a sequestration soon after followed. Two or three years afterwards, before their funds had been realised, and their affairs wound up, they made an offer to the creditors, of a compensation of 20 s. in the pound, with interest up to the period of the sequestration, with security for payment, on approval of the composition by the Court. This was accepted by more than the statutory number of the creditors. Petitions for approval were presented, but were objected to by three creditors to a very comparatively small amount, on the ground that since the acceptance of the composition it had been ascertained that the company had realised, or would speedily realise, ample funds to pay their debts in full, with interest to the time of payment. The Court, however, considered the composition reasonable at the time it was accepted, and approved of it, and that judgment was affirmed by the House of Lords.—*Robertson v. Alexander*, 2 Dow & C. 312.

4. A. contracted a debt, and afterwards became a trader; the debt remained unpaid; he went out of trade, and then committed an act of bankruptcy:

Held, that a commission of bankruptcy could be maintained upon such debt and act of bankruptcy.—*Baillie v. Grant*, 1 Cl. & F. 238.

BANKRUPTCY, &c.—*continued.*

See Bankrupt Acts, 24 & 25 Vict. c. 134; 25 & 26 Vict. c. 99.

5. A bankrupt is made defender to an action with the trustee under the sequestration, and a decree is pronounced against him in his absence. He is afterwards allowed to come in without the trustee and lodge defences to the action; after which the pursuers apply and obtain from the Court an order that he shall give security for the expenses of process before he shall be farther heard:

Held, that the order in that advanced stage of the proceedings, is not well founded, and it is accordingly reversed. *Taylor v. Fairlie*, 1 Cl. & F. 355.

6. W. lent money on the security of an estate, which he believed, on the representation of the borrower, to contain 95 acres, and to be ample security for the sum lent. The borrower, after paying the interest of the loan for four years, became bankrupt, and the trustees on his sequestered estate discovered that the description of the lands charged in security to W. did not comprise more than six acres. W. being advised of the objection to his security, applied to the bankrupt, and obtained from him a corroborative and supplemental bond, reciting the former deed, and subjecting the whole 95 acres as originally intended, to secure the loan, and W. obtained feoffment on this latter security before the trustee in the sequestration completed his feudal title:

Held, by the Lords, affirming the interlocutor of the Court of Session, that the supplemental bond was void as against the trustee.—*Inglis v. Mansfield*, 3 Cl. & F. 362.

7. A sheriff (before the passing of the 6 Geo. 4, c. 16), having no notice of a previous act of bankruptcy having been committed by a trader, seized his goods under a *fi. fa.*, but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving, however, his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy:

Held, by the Lords (Lord Denman diss.), that the assignees might maintain

BANKRUPTCY, &c.—*continued.*

trover against the sheriff for the goods seized.

Semble, that the receipt of poundage was evidence of a conversion by the sheriff.—*Garland v. Carlisle*, 4 Cl. & F. 693.

8. A person who keeps a lodging-house, and supplies the lodgers with food and wine, is a trader within the meaning of the bankrupt law.—*King v. Simmonds*, 1 H. L. Cas. 754.
9. A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly, "the party making default to pay to the other the sum of 500*l.* by way or in the nature of specific damages." A. was dismissed, he became bankrupt, and after the bankruptcy brought an action of *assumpsit* on the agreement, to which the defendants pleaded his bankruptcy:

Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement, passed to his assignees.—*Beckham v. Drake*, 2 H. L. Cas. 579.

10. A person adjudicated a bankrupt under the 12 & 13 *Vict.* c. 106, must, if he desires to annul the adjudication, proceed under the 104th section of that statute. If he omits to do so, he can then only proceed by petition of appeal before the Vice-Chancellor.—*Carter v. Dimmock*, 4 H. L. Cas. 337.

On the 15th *February* 1851, A. was adjudicated a bankrupt. On the 19th a duplicate of the adjudication was served upon him; he did not appear to show cause against the adjudication, and on the 28th, notice of it was published in the "*Gazette*." On the 19th of *March* he presented a petition to the Commissioner to annul the adjudication. The Commissioner pronounced his decision on the 14th of *April*, and on the 23rd the bankrupt presented his petition of appeal to the Vice-Chancellor:

Held (affirming a decision of Lord Chancellor *Truro*), that the petition of the 19th of *March* was a petition of appeal against the Commissioner's adjudication; and therefore could not be presented to the Commissioner, whose jurisdiction in such

BANKRUPTCY, &c.—*continued.*

matter was then at an end; that the party had no title to come before the Vice-Chancellor, except on appeal against the adjudication, and that, for that purpose, the petition was presented too late.—*Carter v. Dimmock*, 4 H. L. Cas. 337.

See *Re Plumstead Waterworks*, 2 De G., J., & F. 31.

11. A deed of arrangement, though executed by six-sevenths in number and value of the creditors of an insolvent estate, will not be binding on the rest, if executed so as to be capable of being carried into effect before the passing of the Act 12 & 13 *Vict.* c. 106.

Quære, whether such a deed to be within the statute must provide for the complete distribution of the insolvent's estate and effects without any reservation whatever? It seems that it is void, if it only provides for such distribution among those creditors who are parties to it.

Quære, as to the effect of the word *now* in section 224 of the statute?—*Larpent v. Bibby*, 5 H. L. Cas. 481; *Noble v. Gadban*, *Id.* 504.

The rule which prohibits double proof is not confined to the case where one of two firms consists of only one person, who is also a member of the other firm, but applies likewise to a case where the two firms consist of several persons, some of whom are members of both firms.

A. and B. were partners in *Liverpool*; A., B., and C. were partners in *Pernambuco*. The two firms had dealings with each other. A., B., and C. drew a bill on A. and B., and sold it to persons at *Pernambuco*, who believed that the partnerships were distinct, but that A. and B. were partners of both. On arrival in *Liverpool*, the bill was accepted by A. and B., but before the time for payment both firms became bankrupt. Under the law of *Brazil*, the holders of the bill proved against the estate of A., B., and C. at *Pernambuco*, and received a dividend, and then claimed to prove under the *English* commission:

Held, that they were not entitled to this double proof.—*Goldsmid v. Casenove*, 7 H. L. Cas. 785.

BANKRUPTCY, &c.—continued.

Ex parte Moult, 1 Dea. & Ch. 44; Mont. 321, and *Ex parte Hinton*, De G. 550, confirmed.

BARRISTER. See ATTORNEY AND CLIENT.

The employment of counsel as confidential legal adviser, disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reason on which it is founded continues to operate.

C., a barrister, who had been for several years confidential and advising counsel to *P.*, and had, by reason of that relation, acquired an intimate knowledge of his property and liabilities, and was particularly consulted as to a compromise of securities given by *P.* for a debt which *C.* considered not to be recoverable to the full amount, purchased these securities for less than their nominal amount, without notice to *P.*, after ceasing to be his counsel:

Held, that *C.*'s purchase, while the compromise proposed by *P.* was feasible, was in trust for *P.*; and that *C.* was entitled only to the sum he had paid, with interest according to the course of the Court.—*Carter v. Palmer*, 8 Cl. & F. 657.

A barrister who is a party to an appeal must elect to conduct his own case, or to have it conducted by counsel.—*New Brunswick Company v. Conybeare*, 9 H. L. Cas. 711.

BENGAL CIVIL SERVICE FUND.

A proposal was made to establish, by the subscription of individuals (if approved of and aided by the *East India Company*), a fund for the purpose of creating, at the end of a certain number of years, a retiring pension to be held by members of the *East India Company's* civil service in *Bengal*. The directors did approve of the proposal, and undertook to pay in every year a sum equal to that subscribed by the subscribing members. They suggested rules which were adopted, and in the course of the correspondence between the directors and the subscribers, it was settled by order of

BENGAL CIVIL SERVICE FUND—continued.

the directors and consent of the subscribers, that a subscriber should pay a certain per-centage on his salary during the whole time of his service, and that if, when he wished to retire, he had not paid half (the other half being contributed by the company) of the amount of the principal of the retiring pension (which was fixed at 10,000 rupees, or 1000*l.*) he must fully make up his half, but nothing was expressly declared as to what should be done with the excess, if his payments had exceeded the amount of the half:

Held, affirming the judgments of the Courts below, that the subscriber was not entitled to have such excess refunded.—*Boldero v. The Directors of the East India Company*, 11 H. L. Cas. 405.

BIDDINGS. See AUCTION.**BILLS AND NOTES. See PLEADING, 5.**

A. and *B.* are partners, and goods are purchased on the partnership account. *A.* gives one bill for the price, *B.* gives another, and each accepts for the firm. One of the bills comes into the hands of *C.*, the other into the hands of *D.*, and both raise their actions against *A.* and *B.*, the acceptors.

A. and *B.* raise a process of multiple-poining, and by the Court below are found liable in only once and single payment, and the matter is reduced to a competition between the holders of the two bills.

C.'s bill has been indorsed by *E.*, per procurator of *F.*, and it being denied that *E.* had any power so to indorse, proof is offered of acts of agency by *E.* for *F.*, which would lead the world in general to believe that *E.* had such power; but the evidence is not allowed by the Court below to be gone into, and *D.*'s bill is preferred.

C. appeals from this last judgment, but there is no appeal from the judgment in the multiple-poining.

It was said, *arguendo* by Lord Eldon (Chancellor) and Lord Redesdale, that a power of indorsing per procurator did not require a special mandate, but might be proved by inference from facts and circum-

BILLS AND NOTES—continued.

stances; and though there might be fraud by *E.* upon *F.* that was no answer to a *bonâ fide* holder for valuable consideration.—*Dawson v. Robertson*, 3 Dow, 218.

And that where two or more bills were accepted by a firm, each of them for the whole price of an article furnished, and these bills got into the hands of *bonâ fide* holders for value, the firm was liable for them all; and therefore this was no case for multiple-poin ding.—*Id.*

Judgment, that the cause be remitted, with instructions to receive the evidence as to the procuration, &c.—*Id.*

Sed quare, if it should turn out that both bills are perfectly and equally good, as the judgment that the acceptors are liable in only once and single payment, is not appealed from, and is final in the cause, upon what principle is it to be determined that the one bill should be paid, and not the other? *Per Lord Eldon* (Chancellor), "He must see clearer than I do, who can see the way out of this difficulty."—*Id.*

2. Lord *M.* dies indebted in more than 100,000 *l.*, and leaves funds applicable to the payment of his debts to the amount of only 50,000 *l.* The widow enters into an obligation to pay the whole of her deceased husband's debts:

Held, by the Court of Session, and affirmed by the Lords, that the *English* creditors under this obligation are entitled to interest on the bonds and bills of exchange till the principal is paid, on the ground that such securities carry interest by the law of *England*:

Secus, as to the simple contract debts, which by the law of *England* do not bear interest.—*Montgomery v. Bridge*, 2 Dow & C. 297.

3. A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to such indorser of the dishonour of the bill.—*Solarie v. Palmer*, 2 Cl. & F. 93

See *Paul v. Joel*, 3 H. & N. 456; affirmed, 4 H. & N. 355

4. Where bills were drawn and accepted,

BILLS AND NOTES—continued.

and became due in *France*, but the acceptor, a *Scotchman*, before such bills became due, returned to *Scotland*, and there continued till his death:

Held, by the Lords, reversing the decision of the Court of Session, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the *Scotch* law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in *France* during the absence of the debtor, and had obtained judgment against him.—*Don v. Lippman*, 5 Cl. & F. 1.

See *Story's Conf. of Laws—passim*; *Bain v. Whitehaven Railway*, 3 H. L. Cas. 1; *Jeffrey v. Boosey*, 4 H. L. Cas. 815; *Carron Company v. Maclaren* 5 H. L. Cas. 416; *Goldsmid v. Cazenove*, 7 H. L. Cas. 801.

5. The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes,—established by the *Scotch* Acts of 1681 and 1696, and the 12 *Geo.* 3, c. 72, and 23 *Geo.* 3, c. 18,—is a public document, to which everybody has a right of access, and the publication of which, in a printed paper, does not constitute a libellous publication.—*Fleming v. Newton*, 1 H. L. Cas. 363.
6. *A.* made a promissory note payable on demand, with interest, in favour of *B.* and *C.*, the executors of *D.* *A.* was, with several other relatives, to be entitled to benefits under *D.*'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorised to lend the funds in their hands on personal security, and a part of those funds having been lent to *A.* (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on until the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement, but, when it had been signed by the other parties, took it into their possession. The executors brought the action on the bill while

BILLS AND NOTES—*continued.*

the legatee in question was alive, and before he had attained the specified age. *A.* pleaded the agreement as an answer to the action, averring that the plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age at the time the agreement was proved :

Held, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note.—*Salmon v. Webb*, 3 H. L. Cas. 510.

7. The agent and manager of the business of a *London* firm, who resided in *Sweden*, gave to a merchant there about to draw bills on that firm, an "assurance that the bills will be accepted;" whereon bills of lading of cargoes of timber were transmitted to the *London* firm, and bills of exchange were drawn against them:

Held, that this assurance, though thus made and acted on, was not as between the *London* firm and the foreign merchants, to be treated as equivalent to an acceptance of the bills, so as to vest in the *London* firm legal rights from the time of such assurance given.—*Hoare v. Dresser*, 7 H. L. Cas. 290.

- S.* and *S.*, trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part; certain of the creditors, as trustees of the second part; and the general scheduled creditors (among whom the trustees were named) of the third part. The deed empowered the trustees to carry on the business under the name of the "*Stanton Iron Company*," to execute all contracts and instruments necessary to carry it on; to divide the net income to be taken among the creditors in rateable proportions (such income to be deemed the property of *S.* and *S.*), with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be retransferred by the trustees to *S.* and *S.* Two of the creditors, *C.* and *W.*, were named among the trustees. *C.*

BILLS AND NOTES—*continued.*

never acted. *W.* acted for six weeks, and then resigned. Some time afterwards, the other trustees, who continued to carry on the business, became indebted to *H.*, and gave him bills of exchange, accepted by themselves, "Per proc. the *Stanton Iron Company*:"

Held, that there was no partnership created by the deed, and that consequently *C.* and *W.* could not be sued on the bills as partners in the company.

Held also, that they could not be sued for goods sold and delivered, there being no distinction, upon the question of liability, between the bills and the consideration for which they were given.—*Cox v. Hickman*, 8 H. L. Cas. 268.

BILL OF LADING.

1. A carrier by sea, under a bill of lading of goods "to be delivered in the like good order and condition at the aforesaid port of &c., all and every the dangers of the sea, &c. excepted, unto Mr. — or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled, immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss.—*Bourne v. Gullif*, 11 Cl. & F. 45.

BOND. See FRAUD. PLEADING, 2.

1. In an action to reduce a cautionary bond on two grounds, first, fraud, secondly, that the bond had not been duly executed according to the forms of the *Scotch* law, the Court of Session pronounced no decision on the second point. The case was remitted to the Court of Session to decide whether under the Acts 1681, c. 5, and 1696, c. 15, the bond was valid, notwithstanding the alleged defects in the execution, the party impeaching the bond being declared entitled, should it be declared to have been valid, to go into evidence as to the alleged fraud.—*Smith v. Governor and Company of Bank of Scotland*, 1 Dow, 272.

See *Railton v. Matthews*, 10 Cl. & F

BOND—continued.

934; *Hamilton v. Watson*, 12 Cl. & F. 109; *Squire v. Whitton*, 1 H. L. Cas. 333; *Bonar v. Macdonald*, 3 H. L. Cas. 226.

2. A., an expectant heir, being indebted to B., his friend and father-in-law, and B. being indebted to C., A. gives C. *post obit* bonds in discharge of his debt to B., and C. gives B. credit in account for half the amount of the bonds. After the death of A.'s father, when the bonds had become payable, A. and B., by deeds deliberately executed, acknowledge the fairness of the transaction. A. then files a bill against C. and B., to set the bonds aside, on the ground of imposition and want of consideration; and afterwards dismisses his bill as against B., and examines him as a witness; so that no relief could be had by any party against B. in that cause:

Held, by the Lords, reversing a decree of the Irish Chancery, that under these circumstances of acknowledgment, dismissal, and examination of B. as a witness, A. had debarred himself from impeaching the consideration for the bonds, and that he could not impeach the securities for fraud or imposition; but that from the confidential situation of B., with regard to A., and the knowledge which C. had of all their transactions, the bonds ought not to be available as *post obit* bonds, but only for the sums actually allowed by C. as the consideration for them, with interest from their dates.—*Bernal v. The Marquis of Donegal*, 3 Dow, 133.

See *Earl of Mansfield v. Ogle*, 7 De G., M., & G. 181; *Banatyne v. Barrington*, Cas. temp. Nap. 459.

3. A. gives a cationary obligation to B., and engages to transfer and assign to him certain property in security, to enable B. to raise money, under an agreement, by which certain contemporaneous conditions were to be performed by B., and then gives B. a letter and orders for the property, in which the conditions were not mentioned. C. advances money for B., obtains an assignation of the letter and orders, and brings an action of adjudica-

BOND—continued.

tion in implement of his obligation against A., alleging that the money had been advanced on the faith of the letters and orders, and not on that of the agreement, of which B. had not performed his part. So found by the Court below, and decree for C. But the judgment reversed by the House of Lords, on the ground that C., before he advanced, or became bound, to advance money for B., had such notice of the existence of some agreement relative to the obligation by A., as imposed upon him the duty of inquiry as to its terms: also on the ground that the letter by itself was an obligation without consideration, and that the agreement must be let in to give it validity, &c.—*Grant v. Campbell*, 6 Dow, 239.

See *Owen v. Homan*, 4 H. L. Cas. 997.

4. The Commissioners under an Act of Parliament lent money to A., who, together with B. as his surety, entered into a bond for its repayment. A. obtained from the Commissioners several extensions of time for the payment, without the privity or knowledge of B., the surety. A., after some time, became bankrupt, and proceedings were then taken against B. He filed a bill to restrain the Commissioners from taking these proceedings, on the ground that the indulgences granted to A., without his privity or knowledge, had discharged him:

Held, that he was discharged.—*Bank of Ireland v. Beresford*, 6 Dow, 233.

See *Bonar v. Macdonald*, 3 H. L. Cas. 226; *General Steam Navigation Company v. Roll*, 6 Com. B. (N.S.) 580; *Harrison v. Courbould*, 3 B. & Ad. 39; *Strong v. Foster*, 17 Com. B. 222; *Owen v. Homan*, 4 H. L. Cas. 997; *Oswald v. Mayor of Berwick*, 5 H. L. Cas. 856.

5. The grantor of a heritable bond was taken bound "to infest and seize, A. B. and his foresaid, on our own expenses, in the lands and others above disposed, to be holden from me of and under my immediate lawful superiors thereof, in the same

BOND—continued.

manner as I hold the same myself, and for payment of the same feu duties as I pay, or am bound to pay therefor." No confirmation from the superior was obtained :

Held, by the Lords, affirming a judgment of the Court of Session, that this was a public holding, and invalid for the want of confirmation.—*Stevenson v. Rowand*, 2 Dow & C. 104.

6. Two ladies entrusted much of the management of their affairs to A., who was not a professional person. In the course of business A. became bound with them in a bond for 10,000 l. given on their account; on the same day, they executed a bond to A. for 12,000 l. The survivor of the two ladies afterwards, by her will, left a legacy of 2000 l. to A. The bond for 12,000 l. was, on the face of it, a simple money bond :

Held, that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was partly for indemnity; and that the burden of proving it to be an indemnity bond lay on the party impeaching the bond.—*Nicol v. Vaughan*, 1 Cl. & F. 49.

See S. C. again, 1 Cl. & F. 495.

7. In a suit for administration of assets of obligors in a common money bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligors and the obligee took exceptions to the report; the former alleging that it was a bond of indemnity, the latter claiming it partly for money advanced, and partly for services performed. The Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. This House, on appeal, reversed that order, and remitted the case to the Court below to decide these questions, on the evidence before it. The Court below decided accordingly upon a new hearing, and declared the bond to be partly for counter-secu-

BOND—continued.

rity, and partly a gift for services. This House, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed. The Court below subsequently upon the hearing of counter-petitions, one presented by the representative of the obligee, praying payment of the bond and interest, the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond on the ground that a gift from a principal to an agent was invalid in equity, decreed for such suit, and granted an injunction against any proceedings on the bond in the meantime. This House, upon appeal, reversed that decree, holding that, as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit, in which no new evidence could be produced.—*Nicol v. Vaughan*, 1 Cl. & F. 495.

8. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned, to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever :

Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary disposition to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond, were declared to be specialty creditors upon the obligor's estate for satisfaction of their claims under the bond.—*Logan v. Wienholt*, 1 Cl. & F. 611.

BOND—continued.

See *Jordan v. Money*, 5 H. L. Cas. 185; *Smith v. Osborne*, 6 H. L. Cas. 386; *Burroues v. Gore*, 6 H. L. Cas. 907; *Bell v. Clarke*, 25 Beav. 440; *Jeffries v. Alexander*, 8 H. L. Cas. 611; *Loxley v. Heath*, 1 De G., F., & J. 490; *Graham v. Wickham*, 1 De G., J., & S. 480.

9. No action can be maintained on a bond given to a person in consideration of his doing something contrary to the terms of letters patent, and he is equally incapable of recovering, whether he knew or did not know the terms of the letters patent.—*Davergier v. Fellowes*, 1 Cl. & F. 39.

See *Barclay's case*, 26 Beav. 178; *In re Aston*, 27 Beav. 480.

The illegality of the condition of the bond may be shown by the plaintiff in stating the bond itself with the condition in his declaration, or if he omits to state the condition, and confines himself, as he did in this case, to mainly setting forth the obligatory part of the bond, the condition may be shown by the defendant in his plea, and the Court will equally take notice of the illegality in either case.—*Id.*

10. *Watson* undertook, by bond, jointly and severally, with the trustee of a bankrupt estate in *Scotland*, to answer to the extent of 1000*l.* that the trustee should faithfully discharge his office, account for his management of the estate, &c. The creditors of the bankrupt, according to the bankrupt law in *Scotland*, chose Commissioners to act for them, and to superintend the proceedings of the trustee. The trustee having managed the estate for 13 years without censure, was, in the 14th year, found to have, by various contrivances amounting to fraud, abstracted from the bankrupt estate a large sum, and his accounts were deficient to the amount of 1008*l.* The bond being put in suit against *Watson*, the co-obligor and surety, he pleaded that the Commissioners, by neglect and connivance, had caused and permitted the trustee's default, or, knowing it, had concealed it from him, but of this imputation he did not give any proof,

BOND—continued.

and it was denied by the Commissioners:

Held, by the Lords, reversing the judgment of the Court below, that the surety was not discharged from his obligation by the alleged neglect of the Commissioners in not detecting the fraud and malversation of the trustee.—*Macdaggart v. Watson*, 3 Cl. & F. 525.

See *Black v. Ottoman Bank*, 15 Moo. P. C. 477; *Railton v. Matthews*, 10 Cl. & F. 934; *Bonar v. Macdonald*, 3 H. L. Cas. 228.

11. *R. and S.*, partners in trade, executed in the year 1811, four joint and several bonds to *O.*, to secure repayment with interest of 10,000*l.* advanced to them by his acceptance and payment of four bills of exchange, amounting together to that sum. Two of the bonds were made payable in 1817, and two in 1818. *S.* died early in 1815, and his executors agreed with *R.* and with *K.*, who was then in partnership with *R.* in place of *S.*, that *R.* and *K.*, in consideration of the outstanding debts and effects of the former partnership, should pay certain sums to the executors, and should also indemnify *S.*'s estate against certain scheduled debts, including these bonds. No notice of that agreement was given to *O.* He continued to receive interest on the bonds from the new firm as well after as before they became due, and the annual accounts which the firm furnished to him contained an account of the dividends due to him on 17,000*l.* stock, which he lent to the new firm. From *O.*'s correspondence with that firm in 1820, it appeared that he had in 1817 given them three years' farther time for payment of the bonds, and that in 1820 he gave 12 months' farther time. These indulgences were granted without consent of *S.*'s executors. In 1823, *O.* took from *R.* and *K.* a collateral security for payment of the debt, expressly reserving his right against *S.*'s estate in respect of the bonds, but concealing this arrangement from *S.*'s executors. In 1829, *O.*'s executors, to whom he had assigned the bonds before his death, applied for payment

BOND—continued.

of them to S.'s executors, who thereupon filed their bill, praying that it might be declared that their testator's estate was discharged from the bonds:

Held, that the indulgence granted by O. for the payment of the bonds in 1817, without consent of S.'s executors, had the effect of discharging his estate.—*Oakley v. Pasheller*, 4 Cl. & F. 207.

See *Owen v. Homan*, 4 H. L. Cas. 997.

12. *G. R.* became a partner in a mercantile house in *Ireland*, in the year 1801, and having no ready money to bring into the firm, and being in *London*, he obtained from *N. & Co.*, *London* bankers, a credit for 10,000*l.*, by giving them his bonds, with warrants of attorney, to confess judgments to secure the payment of the loan. Four bonds, drawn on *Irish* stamps by the *London* bankers' law agent in *Ireland*, were executed there by *G. R.*, who resided in *Ireland*, and had large estates there, and none elsewhere. Each of the bonds was expressed to be for the sum of 5000*l.*; conditioned for the payment of 2500*l.* "sterling, good and lawful money of Great Britain, with legal interest." The last of the bonds was payable in March 1804. The warrant of attorney to each bond was expressed to be to confess a judgment upon a bond for 5000*l.* "sterling, good and lawful money of Great Britain, with legal interest of like lawful money of Great Britain." The judgments were entered up in the Court of King's Bench in *Ireland* in the usual form, and had the word "sterling" only. The 10,000*l.* put to *G. R.*'s credit in the *London* bank, were applied in paying, in *London*, by *G. R.*'s direction, bills drawn by his partners in *Ireland*. Payments on account were made by *G. R.* and his agents, to *N. & Co.*'s law agent in *Dublin*, in *Irish* currency, and he acknowledged these payments. The assignee of the securities, several years after, filed a bill in *Ireland* against *G. R.*'s heir-at-law and executor, claiming full principal and interest; and thereupon a question was raised, whether the debt was to be repaid in *English* or *Irish* cur-

BOND—continued.

rency, and with *English* or *Irish* interest:

Held, by the House of Lords (reversing so far the decree of the Lord Chancellor of *Ireland*), that the sums secured by the bonds should be treated as principal money of *English* currency, bearing *English* interest, payable in *London*, with exchanges on the payments made by *G. R.* on the foot of the bonds at the rate of the day on which such payments were made.—*Noel v. Rochfort*, 4 Cl. & F. 158.

13. Where a bond which, on the face of it appears to be a simple money bond, is given to secure a sum certain, with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances.—*Walker v. Hardman*, 4 Cl. & F. 258.

The conduct of the principals, creditor and debtor, with respect to such a bond, will not affect the rights and liabilities of an innocent surety, who has not authorised their dealing with the bond in a particular manner.—*Id.*

The fact that a bond is payable on demand, and that interest is payable from the date of the bond, is a circumstance to show that it is a simple money bond, and not a bond to secure floating balances.—*Id.*

14. The rule as to liability of sureties in a bond is the same in *Scotland* as in *England*, namely, that they are not to be discharged from their obligations, unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. It is the duty of a surety to see that his principal does his.—*Creighton v. Rankin*, 7 Cl. & F. 325.
15. The bond given by a collector and his sureties to the Commissioners of Land and Assessed Taxes, under the 43 *Geo* 3, c. 99, is broken, if the taxes collected in any one year are not duly paid up by the collector to the account of that year.—*Gwynne v. Burnell*, 7 Cl. & F. 572.

The breach of the condition of the

BOND—continued.

bond is equally complete, and the sureties are equally liable, though all the monies collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the Commissioners, in satisfaction of the arrears of a former year.—*Gwynne v. Burnell*, 7 Cl. & F. 572.

Such appropriation of part of the monies of one year to the payment of the arrears of a former year, will not prevent the Commissioners from maintaining an action on the bond against the sureties for the year in which the money collected has been so misappropriated.—*Id.*

The Commissioners may come upon the sureties after they have sold the lands and goods of the collector, but the seizure and sale of his lands and goods is a condition precedent to their right of action against the sureties, and they are not entitled to require notice of such lands and goods in order to perform the condition.—*Id.*

See *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Owen v. Homan*, 4 H. L. Cas. 997; *Oswald v. Mayor of Berwick*, 5 H. L. Cas. 856.

16. A partnership composed of three persons, A., B., and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; A. died, B., the son and heir of A., within one year after his father's death, gave to the bank a heritable bond over his father's estates, for securing payment of advances to be made by the bank:

Held, that this was a bond for his own and not for his father's debts, and was consequently void under the *Scotch Act of 1661*, as a bond granted by the heir within one year of the ancestor's death.—*Royal Bank of Scotland v. Christie*, 8 Cl. & F. 214.

17. In construing an agreement in the form of a bond, in which a surety became liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and

BOND—continued.

controlled by reference to the prior clauses specifying the extent of the agency:

Held, accordingly (affirming the judgment of the Court of Session), that monies received by an agent on account of his employers during the time of his agency, but not in pursuance of the particular agency disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligations "that during the whole time the said J. D. B. (the agent) shall continue to act as agent as aforesaid, in consequence of the above-recited agreement, he shall well and truly account for, and pay to us (the employers), all sums of money received by him on our account."—*Napier v. Bruce*, 8 Cl. & F. 471.

18. A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment, by the employers, of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding judge directed the jury, that the concealment to be undue must be wilful and intentional, with a view to the advantages the employers were thereby to gain:

Held, by the Lords (reversing the judgment of the Court of Session), that the direction was wrong in point of law.

Mere non-communication of circumstances affecting the situation of the parties, material for the surety to know, and within the knowledge of a person obtaining a surety bond, though not wilful or intentional, or with a view to any advantage to himself, is undue concealment, and will release the surety.—*Railton v. Matthews*, 10 Cl. & F. 934.

19. A surety is not of necessity entitled

BOND—continued.

to receive, without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact that immediately after the execution of the obligation, the cash credit is employed to pay off an old debt to the banker.—*Hamilton v. Watson*, 12 Cl. & F. 109.

See *Squire v. Whitton*, 1 H. L. Cas. 333; *Bonar v. Macdonald*, 3 H. L. Cas. 226.

20. A bond, void in law, may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made. An instrument purporting to be a bond, executed by the obligor with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party. A party joining as surety in a bond ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor. *M.* induced *W.* to join him, as surety, in a bond for repayment of a loan, saying he only wanted time to realise securities, and he would hold her harmless. *M.* and *S.*, being trustees of a fund, sold it with the consent of *B.*, the cestui que trust, and thereby raised the loan for *M.*, who informed *W.* that *B.* was the lender, but did not inform her how the loan was raised:

Held, that *B.* not being in fact the lender, his personal representatives had no privity of contract with or equities against *W.*, and that in consequence of the concealment from her of the real nature of the transaction, she was in equity altogether released from the bond.—*Squire v. Whitton*, 1 H. L. Cas. 333.

See *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Owen v. Homan*, 4 H. L. Cas. 997.

BOND—continued.

21. By the marriage settlement of *R. B.* in 1767 there was (in addition to other things), a sum of 1500*l.*, secured for the portions of younger children of the marriage, to be apportioned as he might think fit. In 1806 his daughter (a younger child) married *G. G.*, and on occasion of that marriage *R. B.* executed two bonds to secure payment of two sums, 1000*l.* and 500*l.*, payable on his death; the former not to bear interest till his death; the latter to bear interest from the execution of the bond. These bonds were accompanied by warrants of attorney, on which, however, judgments were never entered up. On the same day a marriage settlement was executed, which vested these two bonds in *T. B.* (*R. B.*'s son and heir-at-law) and *J. H. C.* as trustees (they being so described in the bonds themselves), on trust to pay the interest to *G. G.* and his wife during their lives, and after their deaths in trust for the children of the marriage, in such shares as *G. G.* should appoint; otherwise equally. No appointment was made. In 1807 *T. B.* married, and on his marriage a settlement was executed, by virtue of which the estates of *R. B.* were conveyed to trustees for the term of 300 years on certain trusts, one of which was to raise a sum of 5000*l.*, and apply the same in the first instance to pay the 1500*l.* the portions for *R. B.*'s younger children, and the rest to the payment of such specialty debts as "are now due and owing" by *R. B.*; and if there should be any residue, to pay over the same to *R. B.* Subject to this term, the estates were conveyed to *R. B.* for life, to *T. B.* for life, and to the first and other sons of *T. B.* in tail male. *R. B.* died in 1816, and *T. B.* entered into possession of the estates. *R. B.*'s widow took out probate of his will, and received general assets to the amount of 7500*l.* *T. B.* died in 1836. Interest on the sum secured to *G. G.* was paid during his life, by the agent of *T. B.*, and of his son *R. B.* the younger, who had succeeded under the settlement of 1807 to the estates. A part of the sum of 5000*l.* was raised in 1844, and the 1500*l.* secured by the settlement of 1767, as portions for

BOND—continued.

younger children paid off, but the 1500*l.* secured by the bonds were not raised. In 1846 *G. G.* died. There was no evidence of payment of interest after his death. In 1848 the children of *G. G.* filed their bill against *R. B.* the younger, *R. G.* (one of their brothers, who for the purposes of the suit had taken out administration *de bonis non* to *R. B.* the elder), and against the possessor of the term, praying that the money secured by the bonds might be satisfied out of the term, &c. An inquiry and accounts were directed, and a report made and confirmed on farther directions. An appeal was then brought against the original decree, and this decree on farther directions;

Held, that under the special circumstances existing here, the suit was maintainable; that though the personal representative of *R. B.* the elder was primarily answerable, yet as the trustees of the bond debt could only sue the person in whom the term was now vested, as that person must then sue *R. B.* the younger as holder of the estate which was subject to the term, and as *R. B.* the younger, besides being the holder of that estate, was also the representative of *T. B.*, the trustee of the bond debt under the settlement of 1806, a Court of Equity, seeing that all the parties really interested were before it, would not, especially after an inquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits.—*Burrowes v. Gore*, 6 H. L. Cas. 907.

Held also, that the settlement of 1806 created a trust in respect of the bond debt; but that debt was not within the words of the settlement of 1807, a debt of *R. B.*, then "due and owing," but that it would have been so had the trustees performed their duty by entering up judgment on the warrants of attorney, and that their neglect in this respect could not be set up as a defence by *R. B.* the younger, as the owner of the estate, he himself being also the representative of the surviving trustee, and, as such, bound to obtain pay-

BOND—continued.

ment of the money secured by the bond.—*Burrowes v. Gore*, 6 H. L. Cas. 907.

Per Lord St. Leonards: These bonds were equitable charges on the land.—*Id.*

Held (Lord *Wensleydale diss.*), that the Statute of Limitations, 3 & 4 *Will.* 4, c. 27, did not operate as a bar to this suit, an express trust of a charge upon land being by the true construction of that statute, as much saved from its operation as an express trust of the land itself; and as *Robert Burrowes* the younger represented his father (the surviving trustee of the bonds), and was himself the owner of the estate out of the term in which these bonds were by the trusts of the deed of 1807 to be satisfied, he was at once the hand to pay, and the hand to receive, and he therefore could not set up the statute as his defence for not performing the trust.—*Id.*

Held also, that the right of these *cestuis que trust* did not arise till the death of *G. G.* in 1846, and that as they had brought their suit within two years afterwards, the 3 & 4 *Will.* 4, c. 27, did not in fact apply to them.—*Id.*

BOUNDARIES. See CONTRACT, 4.

1. *Semble*, that the possession of *shealings* is very strong evidence of right in questions as to boundaries in the Highlands.—*Seaforth v. Hume*, 2 Dow, 339.
2. A claim of right of common on the high grounds in the Highlands, where the title depends on usage and possession, must be rested on very clear evidence.—*Fraser v. Chisholm*, 2 Dow, 561.
3. *Per Lord Redesdale*: In wastes where there are no fences, the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing.—*Dixon v. Graham*, 5 Dow, 216.
4. By lease made in 1719 the lessor demised, for three lives, renewable for ever, all that part of the townland of *B.*, containing 509 acres arable,

BOUNDARIES—*continued.*

meadow, and pasture, bounded on the south by *D.*, on the north and east with *L. N.*, and on the west with *T.*'s and *W.*'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone and coal, and all royalties, and all timber above and under ground. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises :

Held, by the Lords, affirming judgments of the Courts in *Ireland*, that 400 acres of *B.*'s bog, and land reclaimed from bog, which were situated within the ambit of the specified boundaries, passed under the lease and renewals thereof in addition to the 509 acres, arable, meadow, and pasture.—*Jack v. McIntyre*, 12 Cl. & F. 151.

BRIBERY.

1. The 17 & 18 Vict. c. 102, s. 2, declares guilty of bribery "every person who shall, directly or indirectly, by himself or by any other person, give or agree to give, or promise money, &c., to any voter, in order to induce any voter to vote, or refrain from voting, &c., or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting," &c., provided that this shall not extend to money paid on account of legal expenses *bonâ fide* incurred.

An election was about to take place at *C.* *S.* was one of the candidates. In the committee-room of *S.*, the question was discussed whether paying the expense of bringing up out-voters was legal. *S.*, after referring to a law book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed requesting out-voters to come up and vote for *S.* Upon *S.* making this declaration of his opinion, a clerk to an agent of *S.* (without any express direction from *S.* or from the agent) wrote at the bottom of each circular "Your expenses will be paid." A voter who resided at *H.* received one of these circulars with this added note: he came to *C.* and voted for *S.*, and afterwards received the sum of

BRIBERY—*continued.*

8s., the expenses to which he had *bonâ fide* been put by his journey :

Held, that the whole circular must be treated as written by the authority of *S.*, that that payment was forbidden by the 17 & 18 Vict. c. 102, s. 2, and that, for the purposes of that statute, the payment must be treated as "corruptly" made.—*Cooper v. Slade*, 6 H. L. Cas. 746.

2. A letter was written to an out-voter, requesting him to come to a borough, and record his vote for *S.* A postscript added, "Your railway expenses will be paid." The voter did come and vote as requested; his travelling expenses were paid :

Held, that the promised payment constituted only one act of bribery within sect. 2 of 17 & 18 Vict. c. 102, and that consequently two counts one for the promise to pay, and one for the actual payment, could not be supported.—*Id.*

[This payment has since been legalised. 21 & 22 Vict. c. 87.]

BRIDGE. See HIGHWAY.

BROKER. See PRINCIPAL AND AGENT.

In case, the declaration alleged, that *A.* employed *B.* as a broker to sell and deliver oil on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to *B.*; that *B.* accepted the employment, and sold oil to *C.* on the terms of payment on delivery; that it thereupon became the duty of *B.* not to deliver the oil without payment; that *B.* delivered the oil to *C.* but did not obtain payment, whereby the plaintiff was damaged :

Held, that the duty of *B.* arose out of the contract; that this declaration, therefore, set forth a good cause of action; and that, after verdict, judgment could not be arrested.—*Brown v. Boorman*, 11 Cl. & F. 1.

CANAL AND ROAD ACT. See CORPORATION. CONTRACT. COMPANY. COMPENSATION.

1. Where a Canal Act gave to the proprietors of the navigation a power of making a canal, and of using the waters of a river for supplying it,

CANAL AND ROAD ACT—*continued.*

but provided at the same time for securing to the owners of certain works the use of the surplus waters of that river; the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity from the river, so as injuriously to affect the works in question. A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them.—*Glamorganshire Canal Company v. Blakemore*, 1 Cl. & F. 262.

A clause in a second Act of Parliament relating to the same canal, declared that the works thereby authorised should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time:

Held, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on adversely to the interests of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action.—*Id.*

2. A canal formed under a private Act of Parliament, had three levels, of which A was the highest, B the middle, and C the lowest level. The canal proprietors (though without authority under their Act to do so) erected engines between the C level and the plaintiff's mill-forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new Act, repealing former Acts, and re-enacting their provisions, with certain alterations and additions, was passed. The 15th section gave the canal proprietors authority to maintain engines, &c. for supplying the canal with water, and for that purpose to have

CANAL AND ROAD ACT—*continued.*

reservoirs and feeders supplied from all brooks, streams, &c., from which they were lawfully supplied before the passing of the Act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs; and for any of the purposes aforesaid to use such engines as they should judge proper, making full satisfaction for all damages to be sustained by the owners of any mills, forges, brooks, streams, &c., taken, used, removed, diverted, or injured," in execution of the powers of the Act. By the 80th section, the canal proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C, not required for the purposes of the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C back into the level A; in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river:

Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation under the Act.—*Elwell v. The Birmingham Canal Company*, 3 H. L. Cas. 812.

CARRIER.

1. Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action for a loss against the carrier, yet if the consignor makes a special contract with the carrier, such contract supercedes the necessity of showing the ownership in the goods, and the consignor may maintain the action though the goods may be the goods of the consignee. The question whether in fact goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee.—*Dunlop v. Lambert*, 6 Cl. & F. 600.

CARRIER—*continued*.

2. A carrier by sea, under a bill of lading, of goods "to be delivered in the like good order, &c., at the port, &c., all and every the dangers of the seas, &c. excepted, unto Mr. — or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled, immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss.

In a declaration against carriers, one of the counts averred the contract to be to carry goods from D. to L., and to take care of them on landing them at a wharf there, and to deliver them to the plaintiff; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire, without defendant's default:

Held, a good plea to the count.—*Bourne v. Gallif*, 11 Cl. & F. 45.

CERTIORARI. *See* PRACTICE.

CESSIO BONORUM.

A party applying for a *cessio bonorum*, must make a full and clear disclosure for the information of his creditors, since fraud, though not mere irregularity in keeping books and accounts, will deprive the debtor of the right to the assistance of the Court in allowing this process.

Per Lord Redesdale: The onus of proving the fraud rests with the parties objecting to the remedy.—*Wight v. Ritchie*, 2 Dow, 377.

CHALLENGE OF JURY. *See* JURYMAN. PRACTICE.

A challenge to the array in the Court of Queen's Bench, *Dublin*, alleged that the jurors' book had not been completed in conformity with the requisites of the Act 3 & 4 Will. 4, c. 9; that the names of 59 persons, duly qualified to serve on juries had been fraudulently omitted from the general list, from which the book was made up and from the book itself, for the purpose of prejudicing the defendants; but the challenge did not contain any specific accusation against the sheriff or other

CHALLENGE OF JURY—*continued*.

returning officer concerned in preparing the list. *Quere*, whether the causes of challenge to the array thus alleged, were sufficient?—*O'Connell v. The Queen*, 11 Cl. & F. 155.

See *Irwin v. Grey*, L. R., 2 H. L., 22.

The right of a defendant to a peremptory challenge of jurors to the number of 20, exists in all cases of felony, and is not confined to those which are punished capitally. The law is, in this respect, the same in *Ireland* as in *England*.—*Gray v. The Queen*, 11 Cl. & F. 427.

See *O'Brien v. The Queen*, 2 H. L. Cas. 465; *Irwin v. Grey*, L. R., 2 H. L., 22.

A town councillor is, by the 3 & 4 Vict. c. 108, s. 180 (*Ir.*), disqualified from being a special jurymen. The name of a town councillor stood on a special jury list after it had been reduced:

Held, that under the *Irish Jury Act*, 3 & 4 Will. 4, c. 91, he was liable to challenge for this disqualification when about to be sworn.—*Barrett v. Long*, 3 H. L. Cas. 395.

The right of challenge against a jurymen is a common law right, which cannot be taken away except by the express terms of the statute, and *quere*, whether it is taken away by the 3 & 4 Will. 4, c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge.—*Id.*

It is not taken away by the effect of the 3 & 4 Will. 4, c. 91, in respect of a disqualification created since that statute, and where a challenge, in respect of such disqualification, was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced.—*Id.*

CHANCERY. *See* EQUITY. INFANT. JUDGES.

1. The *Attorney General* (after the passing of the statute 5 Vict. c. 5, 1841), filed an information in Chancery against the Mayor and Commonalty of *London*, alleging that the Crown was seised of the bed and soil of the

CHANCERY—continued.

river *Thames*; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity:

Held, affirming an order of the Master of the Rolls, that the information was maintainable in Chancery.—*Mayor of London v. The Attorney General*, 1 H. L. Cas. 440.

2. *Quare*, whether the words "the Court of Chancery," in the 5th section of the 18 & 19 *Vict.* c. cxlix (the *Stockton and Darlington Railway Act*), apply exclusively to the Lord Chancellor or to the Lords Justices sitting in Lunacy.—*Stockton and Darlington Railway Company v. Brown*, 9 H. L. Cas. 246.

The Vice-Chancellor made a decree, which was afterwards varied by the Lords Justices. This House restored the decree of the Vice-Chancellor, and farther proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the Lords Justices.—*Id.*

3. An order in Chancery made in petition constituting a guardian for an infant, makes that infant a ward of Court.—*Stuart v. Bute (Marquis)*, 9 H. L. Cas. 440.

The Lord Chancellor, though "Chancellor of *Great Britain*," has only certain statutory powers in *Scotland*, which are not of a judicial nature.—*Id.*

The 48 *Geo.* 3, c. 151, s. 15, applies to judgments and orders in regular suits, and not to orders made with respect to the custody of infants. The latter kind of order may be made either on a bill or petition.—*Id.*

CHANCERY—continued.

Semble, that every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal.—*Stuart v. Bute (Marquis)*, 6 H. L. Cas. 440.

A. was the son of a person who was at once a peer of the *United Kingdom* and a peer of *Scotland*. A. was born in September 1847. A.'s father had estates in both countries, and resided at intervals in both. He died in *England*, in March 1848. A.'s mother was, in May 1848, appointed by the Court of Chancery his guardian, and A.'s uncle (the heir presumptive to the title) was appointed tutor at law in *Scotland*. This appointment gave him no right to the custody of the infant's person, but only conferred on him the management of the property till the infant should become 14 years of age. A.'s mother died in *Scotland* in December 1859. By the will of the mother, S. and M. were appointed guardians, and that appointment was confirmed by the Vice-Chancellor, by whom a scheme for the infant's education was prepared and approved of. A. was then in *Scotland*, under the personal care of M. She promised to bring him to *England* to be educated, as S. proposed, in accordance with the scheme of the Court of Chancery. She brought him to *London*, but in consequence of disagreements between herself and S., suddenly carried him back to *Scotland*. Proceedings in the Court of Session were instituted, to compel her to give up the custody of the infant to S.; but though the Court of Chancery had, on the application of S., directed that he should be brought back to *England* to be educated, the Court of Session pronounced an interlocutor, postponing the case for nearly four months, and afterwards two other interlocutors interdicting anybody whatever from taking the infant, "a domiciled *Scotch* subject," out of the jurisdiction of the Court of Session:

Held, that these interlocutors were erroneous; that the jurisdiction of the Court of Chancery had been established at a prior time; that his

CHANCERY—continued.

mother having afterwards changed his domicile of fact, did not affect the matter; that under such circumstances no question of conflicting jurisdiction between the two Courts could arise, but that both, representing the Sovereign as the *parens patriæ*, were bound to assist each other in doing what was necessary to ensure the benefit of the infant, which in cases of this kind was the primary consideration dominating all others.—*Stuart v. Bute (Marquis)*, 9 H. L. Cas. 440.

(*Johnston v. Beattie*, 10 Cl. & F. 42, explained.)

The costs were ordered to come out of the estate.—*Id.*

4. The Court of Chancery is not entitled to entertain an administration suit founded on a question relating to the construction of the will of a person domiciled abroad, and the foreign executors might properly except to its jurisdiction.—*Enhoir v. Wylie*, 10 H. L. Cas. 1.

But parties thus entitled to insist on the authority of the Court of the domicile, may by their conduct give to the *English* Court authority and jurisdiction to construe the will, and administer the estate, so far as funds and persons in this country are concerned.—*Id.*

CHANCERY (IN SCOTLAND).

The Director of Chancery in *Scotland* could not, before the passing of the 57 Geo. 3, c. 64, appoint two persons jointly to be Clerk of Chancery for their lives and the life of the survivor of them.—*Earl of Rosslyn v. Aytoun*, 11 Cl. & F. 742.

See *McMahon v. Lennard*, 6 H. L. Cas. 970.

CHARITY. See MORTMAIN. PLEADING. SURPLUS. TRUSTS AND TRUSTEES.

1. If the trustees of a charity estate make a lease upon terms which, at the time of making it, appear to them *bonâ fide* to be the best that can be got, a subsequent alteration of circumstances will not affect such lease.

In such a case the question of provident or improvident management is entitled to peculiar consideration. The length of time during which the

CHARITY—continued.

property has been occupied under the lease, is also to be taken into consideration.—*Attorney General v. Hungerford*, 2 Cl. & F. 357.

See *Sugden's Law of Property*, 535; *Magdalen College v. The Attorney General*, 6 H. L. Cas. 189.

2. A testator gave the residue of his estate to an incorporated company in the City of *London*, upon trust to apply one moiety of the income to the redemption of *British* slaves in *Turkey* or *Barbary*; one-fourth part to the support of charity schools in the city and suburbs of *London*, where the education is according to the Church of *England*, not giving to anyone above 20*l.* a year; and in consideration of the Company's care and pains in the execution of his will, out of the remaining fourth part, to pay 10*l.* a year to such minister of the Church of *England* as should from time to time officiate in their hospital, and the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, and to apply the income to any use or uses but those mentioned in his will. The income of a moiety of the residue having for several years been suffered to accumulate in consequence of there being no *British* slaves in *Turkey* or *Barbary*, an information was filed for the administration of the charity estate, including the accumulations of the moiety; and it appearing that there were no such *British* slaves to be redeemed, and no other object having been suggested, which in the opinion of the Court bore any resemblance to the redemption of such slaves, it was declared that, after setting apart a certain sum out of that moiety and its accumulations, to provide a fund for the redemption of any *British* subjects who might thereafter be held in slavery in *Turkey* or *Barbary*, the income of the surplus of that moiety and its accumulations ought to be applied in supporting and assisting charity schools in *England* and *Wales*, where the education was according to the

CHARITY—continued.

Church of *England*, but not to an amount of more than 20*l.* a year to any one school.

The Lords, affirming that declaration, agreed that the income of the moiety could not be applied to any other purpose more in conformity with the testator's intentions, and with the object of the charity that failed.

A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the judge, and not upon principle.—*Ironmongers' Company v. The Attorney General*, 10 Cl. & F. 908.

3. The Act 39 *Eliz.* c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them. A municipal corporation is included in the words "every person and persons," and may exercise the powers given by the Act. Real estates conveyed to and vested in a hospital under this statute, cannot be alienated by the hospital, nor can it confirm an alienation of them by the founders. A municipal corporation voluntarily founded a hospital, under the Act 39 *Eliz.* c. 5, and purchased real estates, and caused them to be conveyed to the hospital, but they were kept under the control and management of the founders, who afterwards sold and conveyed them for valuable consideration, granting to the purchasers covenants for title and indemnity against the claims of the hospital. The founders applied the money produced by the sale, together with other monies of their own, in the purchase of an estate at *W.*, and they paid annually to the hospital more than the rents and profits of the sold estates. The hospital acquiesced in that arrangement for 120 years, after which the *Attorney General* and the hospital, by information and bill, claimed a part of the estate at *W.*, bearing the same proportion to the whole estate that the produce of the sale of the hospital's estates bore to the whole purchase money of the estate at *W.*:

Held, *first*, that the estates conveyed to the hospital were well vested in it, and could not be sold without an Act of Parliament, and therefore a

CHARITY—continued.

decree directing the hospital to confirm the sale was, in that respect, erroneous; *second*, that if the hospital's long concurrence and acquiescence in the arrangement for the sale of its estates, were held to bar its right to recover them, or a commensurate portion of the estate at *W.*, the *Attorney General's* right to protect the charity still existed; and *thirdly*, *semble*, that though the hospital's bill should be dismissed, the *Attorney General's* information would be retained.—*The Mayor, &c. of Newcastle v. The Attorney General*, 12 Cl. & F. 402.

4. By the 7 & 8 *Vict.* c. 97, the power of the Commissioners of Charitable Donations and Bequests for *Ireland* to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the Commissioners, are to be, *by themselves*, applied to charitable uses according to the donor's intention. And although they obtain the sanction of the *Attorney General* to their suits, as required by the said Act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the benefit of the general jurisdiction which the Court exercises in suits instituted by the *Attorney General*. A decree, therefore, made at the suit of the Commissioners, first removing a testamentary trustee on the grounds of his bankruptcy and residence abroad, but without proof of any *improper* withholding, or concealment, or misapplication of the trust property, and directing the appointment of another trustee in his place, is wholly wrong.

Semble, that neither bankruptcy nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has unconditionally confided a large personal discretion in the administration of the trust, together with power to appoint a receiver of the funds of the trust estate?—*Archbold v. The Commissioners of Charitable Donations and Bequests in Ireland*, 2 H. L. Cas. 440.

5. The presumption in a gift of lands for charitable purposes, is that they

CHARITY—continued.

are devoted "for ever" to the purposes of the charity, and that no authority to sell them is intended; but a sale of such lands at a distant date with long acquiescence in such sale, and no account of the origin of the charity, may give rise to a presumption that there had been a power enabling the holders of the charity lands to sell them, and that the sale was made under that power.

—*St. Mary Magdalen v. The Attorney General*, 6 H. L. Cas. 189.

Charities are trusts, and are, as such, within the operation of the 3 & 4 Will. 4, c. 27.—*Id.*

The 1st section of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section.—*Id.*

Where the *Attorney General*, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred.

Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and churchwardens, who, with the consent of the vestries, might lease them. The rectors, &c., executed a lease of them for ever to the president and scholars of a college, subject to a fixed rentcharge. Above 60 years after the execution of this lease (the fairness of which at the time of its execution was not impeached), the *Attorney General* filed an information against the lessees, praying that it might be cancelled:

Held, that the real plaintiffs in this suit were the poor of the two parishes; that they were in the situation of a *cestui que trust*; that the suit by information of the *Attorney General* (who had no independent rights), was a suit by them; that they could not maintain such suit unless against their trustees except within 20 years; that this was not such a suit, but was a suit against purchasers for value, and therefore that it was barred.—*Id.*

6. Where a testator gives for charitable

CHARITY—continued.

purposes to A. the whole of an estate, or all the rents of an estate, apportioning those rents so as to exhaust them among charitable objects, any increase in the rents must be applied to the same charitable purposes.—*Beverley, Mayor of, v. The Attorney General*, 6 H. L. Cas. 310.

Where a testator gives to A. an estate or rents, in trust to make certain payments to charities, and speaks of an overplus, which he does not specifically bequeath, if there should be an increase in the profits of the estate, A. will be entitled, after making the specified payments, to take the increase.—*Id.*

A testator in 1652 gave an estate, which he calculated to produce 47 l. a year, to the Corporation of B., upon trust to pay certain sums, which left a residue of 7 l. a year. He made no specific bequest of this sum, but, referring to charges which were then required for the maintenance of the army, he directed that what the mayor could not spare out of the overplus should be deducted out of the payments to some of the charitable objects of his will. These charges for the army ceased, and an increase took place in the income from the property bequeathed:

Held, reversing the decree of the Court below, that this increase belonged to the Corporation of B.—*Id.*

7. A testator gave to trustees funds to be applied by them, "according to their discretion, for the advancement and propagation of education and learning all over the world:"

Held, that this was a valid charitable bequest, and was not void for uncertainty.—*Whicker v. Hume*, 7 H. L. Cas. 124.

8. If the income of lands devoted to charitable purposes is apportioned in defined proportions among different objects of charity, each object will, as a rule, subject to the interference of the Court of Chancery in special cases, be entitled to participate in the increase in the same proportions. *The Attorney General v. The Dean and Canons of Windsor*, 8 H. L. Cas. 369.

So, if there is declared an intention to devote the whole to charity, though the particular appropriation may

CHARITY—continued.

have failed to exhaust the rents, the general declared intention shall prevail, and the whole shall go to charitable uses.—*The Attorney General v. The Dean and Canons of Windsor*, 8 H. L. Cas. 369.

On the other hand, if lands are given to a body, which is itself an object of charity, but given subject to the payment of specific sums to other objects of charity, the increased income will belong to the body to which the lands have been given, and the other objects can claim nothing beyond the specific charges.—*Id.*

All such cases are questions of the intention of the donor, to be determined by the construction to be put on the language he has used.—*Id.*

Henry VIII. directed by his will certain provision to be made for the Dean and Canons of *Windsor*, and the maintenance of the poor knights there. As to the former, he directed that they should provide priests to say masses at his tomb at specified times, and to keep certain obits, and at every obit to give to the poor knights "in almes ten pounds." As to the latter, he gave 12 *d.* a day and a gown of white cloth and a mantle, with an additional payment of a specified sum to the chief of the poor knights. *Edward VI.* made provision for carrying this will into effect. Deeds were executed for granting lands to the Dean and Canons, the Crown reserving to itself a power of directing the distribution of the funds thus provided, and the Dean and Canons covenanting to bestow the rents, to a certain amount, as the Crown should think meet. This power was not exercised in the reign of *Edward VI.*, but in that of *Elizabeth* a deed was executed, and ordinances were made directing what sums were to be paid to the knights, and what gowns and mantles they were to receive. The deed contained the following declaration, "which said lands and other premises, amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will, &c., shall remain to the said Dean and Canons, and their successors for ever; that is to say, for the maintenance of the charges of 430*l.* before declared, and the residue, being 231*l.* 6*s.* 8*d.*, to remain for

CHARITY—continued.

the vicars and serving priests' wages when need requireth reparation of the said lands, the officers' fees, and for the relief of the said Dean and Canons, and their successors." There was no provision for reducing these payments in case the rents should fall short of the sum stated. The deed, as found in the Chapter House at *Westminster*, had the great seal attached to it, but was not shown to have been executed by the Dean and Canons, but their muniments contained an unexecuted copy of it, and they entered into possession of the lands, and rendered accounts to the Crown, showing, among other things, the regular payment of the sums to the poor knights:

Held, that proof of the execution of this deed by the Dean and Canons was unnecessary, that its provisions were binding on them, and that, on the construction to be given to the intention manifested in the will of *Henry VIII.* and in this deed, the lands were given beneficially to the Dean and Canons, and the poor knights of *Windsor* were not entitled to a proportional share in the increased value of these lands.

The will of *Henry VIII.* had no effect in conveying the demesne lands of the Crown: they were conveyed under the deed of *Edward VI.*, and after the execution of *Elizabeth's* deed and ordinances, no part of the profits was impressed with any general unspecified charitable trusts, and no interest, nor any resulting trust, remained in the Crown.—*The Attorney General v. The Dean and Canons of Windsor*, 8 L. H. Cas. 369.

CHARTER. See CORPORATION.

1. A charter granted by the Crown cannot be partially accepted, unless it should appear to be the intention of the Crown that the grantee should have the option to accept in part and reject in part.—*R. v. Westwood*, 2 Dow & C. 21.

A charter vested the right to elect burgesses in the general body of an ancient corporation, and gave a power to make bye-laws to a select body. The general body made a bye-law, delegating the power to elect burgesses to the select body:

CHARTER—*continued.*

Held, that this was a good bye-law ; for the power given by the charter to the select body to make bye-laws did not divest the general body of the power to make bye-laws, which is incidental to it at common law.—*R. v. Westwood*, 2 Dow & C. 21.

The general body of a corporation may lawfully delegate the power to elect burgesses to a select body of the corporation.—*Id.*

2. Where a corporation had held a market by prescription, and the Crown afterwards granted to the corporation a charter, with these words, "quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur:"

Held, that such prohibition, if it could be construed to extend beyond that which is attached by the common law to the grant of a market, was void.—*Re Islington Market Bill*, 3 Cl. & F. 513.

Held also, that the establishment of a new market, to be holden at the same times, within the common law distance of the old market, was *primâ facie* injurious to the latter, and therefore void ; the convenience of the public would not, under such circumstances, justify the grant of a new market.—*Id.*

And where the first charter purported to be granted "de assensu prælatorum, comitum, &c., in instanti Parlamento convocato," a new charter granted to hold a market within the prescribed distance would be void, and would be repealable by *scire facias*. The words stated would have the effect of giving the first charter the authority of an Act of Parliament.—*Id.*

Such a charter could only be repealed by Act of Parliament.—*Id.*

If the market created by the first charter had not sufficient space for the accommodation of the public, and also, if part of the space originally allotted to it was employed, or suffered by the grantee to be employed, for other purposes, without his providing as convenient a place for the public to buy and sell in elsewhere, within the limits of his

CHARTER—*continued.*

grant, such circumstances would furnish a good defence to an action brought by him against any person for selling out of the market ; they might also furnish ground for a *scire facias* to repeal the charter.—*Re Islington Market Bill*, 3 Cl. & F. 513.

Quære, whether such circumstances would not render the grantee liable to an indictment for a misdemeanour ? If they would, an action would also lie against him for his default.—*Id.*

But while such grant remains unrepealed, no other market could be granted within the limited distance.—*Id.*

If by the terms of the grant the market was to be held in a fixed place, defined and known by metres and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more.—*Id.*

CHARTERPARTY *See* ASSIGNMENT.
BROKER. CONTRACT. INSURANCE.
SHIP.

CHURCH AND CHURCH RATE. *See*
GLEBE. MANSE. PRESBYTERY.
LEASES FOR LIVES.

1. Several members of the Church of Scotland seceded from it in 1737, upon one particular point ; they and the seceding minister adhering to the church on all other points. They subscribed money for the purchase of land, and built a chapel, and the purchase was made under a deed of trust. They elected a judicatory in the usual manner, and submitted to it as ordinary members of the church. In 1745 the seceders split into two sects on a question as to the lawfulness of a borough oath, and the minority seceded, and left the rest, many of whom were the original subscribers of the money, in possession of the chapel. In 1795 another division occurred ; the chief minister was supported by the minority (formed chiefly of those who represented the original subscribers) ; the assistant minister by the majority of the existing frequenters of the chapel. On a question to which of the two bodies the chapel belonged, the Court

CHURCH AND CHURCH RATE—*continued.*

of Session had (by a majority of one) decided that it belonged to the existing majority, the actual frequenters of the chapel:

Held, that there was no principle of law under such circumstances which divested the representatives of the original subscribers in favour of any majority of existing attendants at the chapel; and the case was therefore remitted to ascertain with greater exactness, the provisions of the deed of trust and the rights thereby created.—*Craigdallie v. Aikman*, 1 Dow, 1.

See *Shore v. Wilson*, 9 Cl. & F. 355-390; *Williams v. Bishop Salisbury*, 2 Moo. P. C., N. S., 398; *Natal (Bishop) v. Gladstone*, L. R., 3 Eq., 18.

2. The Presbytery found a church to be ruinous, and ordered it to be rebuilt. The heritors of the parish refused to take the proper steps for rebuilding it. The Presbytery did all that was needful for that purpose, and assisted the heritors generally in the necessary sums, but omitted some particular feuars in a small village which formed part of the parish. The jurisdiction of the Presbytery was not denied, but the assessment was questioned on the ground of irregularity. The Court of Session sustained it, and this decision was affirmed, but the case was remitted that the assessment might be amended.—*Maxwell v. Gordon*, 4 Dow, 279.

3. Under the records of the charter of incorporation of the dean and chapter of the cathedral church of the Holy Trinity, *Dublin*, ordaining that "the archdeacon, &c. can and may enjoy a stall in the choir, and a voice and place in the chapter and in all chapter acts, &c."; he has a voice in all its corporate acts, and not merely in the acts of the chapter, considered as the archbishop's council.—*Kildare (Bishop) v. Smith*, 5 Dow, 225.

Semble, that he may vote by proxy.—*Id.*

As to other rights of a member of an ecclesiastical body, see *Repton v. Hodgson*, 3 H. L. Cas. 72 (PREFEND).

4. The statute 10 Anne, c. 12, establishes

CHURCH AND CHURCH RATE—*continued.*

the civil rights of patronage in the Church of Scotland, and the general assembly of that church has no authority to make any acts or regulations which may prevent the exercise of those rights.—*Auchterarder Presbytery v. Earl of Kinnoull*, 6 Cl. & F. 646.

An Act of Assembly, therefore, which permitted the male heads of families in a parish to dissent, without reason assigned, from the induction of a presenter, and declared that if the dissidents formed the majority, the Presbytery should not proceed to the trials and settlement of the presentee, was held contrary to the statute, and consequently illegal.—*Id.*

The Court of Session is competent to entertain, under such circumstances, a suit by the presenter against the Presbytery, for trials and settlement, according to the presentation.—*Id.*

5. The taking on his trials a presentee to a church in *Scotland*, is a ministerial act which the Presbytery is bound to perform, and for the neglect or refusal to perform which every member of the Presbytery is liable to make compensation in damages to the party injured; and he may maintain such action against the members collectively and individually.—*Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251.

6. It is the duty of the parish to repair the fabric of the parish church, and the neglect or refusal to perform this duty will subject those who so neglect or refuse to punishment in the Ecclesiastical Court.—*Gosling v. Veley*, 4 H. L. Cas. 629.

A valid church rate can only be made by an actual or constructive majority of the parishioners in vestry assembled, and if the majority should refuse to make a rate for the purpose of discharging this duty, such refusal would not entitle the minority to make the rate.—*Id.*

An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. Therefore, a resolution passed by the

CHURCH AND CHURCH RATE—*continued.*

majority in vestry to declare that no church rate is necessary, and to refuse any such rate, does not disentitle the persons composing that majority to vote upon the question of any particular proposal for a rate made by any of the minority; and if a rate should be made by the minority alone, the votes of the other persons present not having been taken on it, such rate will be bad.—*Gosling v. Veley*, 4 H. L. Cas. 629.

At a vestry meeting assembled under a monition from the Ecclesiastical Court to consider of and make a rate for the repairs of the parish church, an estimate was produced by the churchwardens, and a rate of 2s. in the pound proposed by them. No objection was made to the estimate, but an amendment was passed by the majority that church rates were bad in principle, and ought to be refused, and the vestry did refuse to make a rate accordingly. The vicar, churchwardens, and certain others of the vestry, without taking any vote on the question, did afterwards produce and sign a rate of 2s. in the pound:

Held, that the rate thus agreed to was invalid.—*Id.*

In a suit to enforce such rate, the libel, after setting forth the refusal of the majority to make the rate, contained this allegation: "The churchwarden proposed, addressing himself to those ratepayers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two churchwardens, and several ratepayers present. The mover of the amendment protested, &c."

Semble, that this allegation showed the rate to have been made by the minority; but—

Held, that to sustain the suit the libel must show the rate to have been made by the majority of the vestry; for that no other rate is valid.—*Id.*

CLEARING WARRANTS. *See* ARMY AGENT.

CLIVE FUND.

In 1770 a deed was executed between Lord *Clive* and the directors, &c. of the East India Company, by which Lord *Clive* transferred to the directors a sum of money to be employed in giving pensions to disabled officers and soldiers and their widows, his declared object being thereby to induce fit persons to enter the company's service, and to encourage them to bravery therein. The directors and their successors were to be perpetual trustees of the fund. In the deed was a covenant to the effect, that if, after 1784, the company should cease to employ a military force in *India*, in the actual pay and service of the company, and ships for carrying on the company's trade, then the company would, subject to the annuities already payable out of the said fund, repay the money to Lord *Clive* or his representatives. In 1833 an Act of Parliament put an end to the company's trading, and ships were no longer employed by the company. In 1858 another Act transferred the Government of *India* from the company to the Crown, and likewise transferred the army of the company to the service of Her Majesty. The same Act vested in Her Majesty all the funds at the disposal of the company, and bound Her Majesty by all the obligations of the company, fiduciary or otherwise:

Held, reversing the decision of the Court below, that the covenant in the deed was a private covenant between Lord *Clive* and the company; that the statutes in question did not affect this covenant; that the objects of the original trust, namely, troops in the pay and service of the company, had ceased to exist; that the covenant had thereupon come into operation, and therefore that the fund, subject to the charges already fixed upon it, had become payable to Lord *Clive's* representatives.—*Walsh v. The Secretary of State for India*, 10 H. L. Cas. 367.

See Ward v. Draw, 33 Beav. 612.

CODICIL. *See* WILL.

COLLIERY. *See* CONTRACT, 1, 6.

COLONIES.

Malta is not (A.D. 1813) a plantation, and therefore a contract for a ship to proceed from the *Thames* to *Martinique*, there to take in a full and complete cargo of sugars, is illegal under the Navigation Acts, 12 Car. 2, c. 18, and 48 Geo. 3, c. 69, and is not helped by the *Malta* Act, 41 Geo. 3, c. 103.—*Rubichon v. Humble*, 1 Dow, 191.

See Clark's Colonial Law, 3 n, and the various statutes repealing the Navigation Acts.

COMMON. See CUSTOM. GAMES.

Evidence that above 40 years before an allotment and division of common land, *A.* had ploughed a certain part of the land and taken a crop from it, such part having continually afterwards been used by the commoners in the exercise of their rights of common, is not sufficient to entitle *A.* to have the particular part adjudged to him as his private property.

A clause with "pertinents" in a boundary charter, held in this case sufficient foundation for a title to the ground which the boundary specifically described in the charter.—*Watt v. Paterson*, 2 Dow, 25.

COMPANY. See CANAL AND ROAD ACTS. COMPENSATION. CONTRACTS. CORPORATION. RAILWAY.

1. A decree, declaring that all the shareholders in a company are bound to pay what may be found due to a plaintiff, does not make the shareholders personally liable.—*Vigers v. Pike*, 8 Cl. & F. 652.
2. Where an Act creating a railway company, or giving new powers to an existing company, authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes: if he does not know of any intention to misapply the funds of the company, but acts *bonâ fide* in the matter, he may enforce performance of the contract.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

Promoters of a company proposing to make a line of railway, or persons standing in a similar situation as

COMPANY—continued.

directors of an existing company applying to Parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the proposed line, should the bill pass, and when it has passed such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

Secus, where the act to be done is itself illegal, and Parliament is to be asked to legalise it.—*Id.*

Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a Court of Equity will not, simply on that account, refuse its interference to compel specific performance.—*Id.*

3. Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the company after the company shall have obtained an Act of Incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation.—*Preston v. The Liverpool Railway Company*, 5 H. L. Cas. 605.

It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the company's bill in Parliament.—*Id.*

C. P. was a landowner; a railway company was projected, and for the intended railway some of his land would be required. He threatened to oppose the bill. The projectors entered into an agreement with him, that "in case the company shall obtain an Act of Incorporation, the company shall pay to *C. P.* 1000*l.* for all lands required by the company for the due making of the railway, and 4000*l.* for residential injury to the estate and hall of

COMPANY—continued.

C. P.:" that a tunnel should be constructed in a particular manner through a part of his property, and that a passenger station should be made, &c. *C. P.* withdrew his opposition, and the bill passed: the railway was not made, nor were the lands required:

Held, that this was not a contract which on the mere passing of the bill entitled *C. P.* to claim from the company payment of the money.—*Preston v. Liverpool, &c. Railway*, 5 H. L. Cas. 605.

[As to the right of a company to sell lands which it has originally taken under the powers of its own Act, or the Lands Clauses Act, see *Carington (Lord) v. The Wycombe Railway Company*, L. R., 2 Eq., 825, affirmed February 1868.]

4. A company is as much bound as an individual by the acts of its authorised agents.—*New Brunswick, &c. Railway Company v. Conybeare*, 9 H. L. Cas. 711.

Reports made by the directors of a company, and afterwards adopted and circulated by the company, are binding on the company as statements made by its authority.—*Id.*

If such reports are afterwards shown to have been the immediate cause of a purchase of shares in the company, and to have been untrue, the company cannot retain the contract or the money thereby acquired.—*Id.*

But where the reports are mere general statements as to existing or anticipated profits and advantages, and are accompanied by documents which afford the means of testing the accuracy of what is so stated, the purchaser of shares having had the opportunity of so testing it, cannot set aside a contract once executed.—*Id.*

Per Lord Cranworth: If the ground alleged for rescinding a contract executed to become a shareholder in a company is a representation that the company had a good title to certain land, whereas it was not a good title but a defeasible title, the opinion of the Court, that the title was doubtful, is not sufficient to warrant the Court to interfere with regard to such a contract.—*Id.*

A., in September 1858, was desirous of

COMPANY—continued.

purchasing shares in a company for making a colonial railway, and applied at its offices for information on the subject. The secretary gave him certain reports issued by authority of the directors. In one of them was this passage, "The system of payment adopted in the province involves the liquidation of every claim once in six weeks; so that when the certificate of the engineer, and the accounts forwarded by the manager are settled, the capital account is virtually closed up at that time." In fact the accounts were made up once in six weeks, but not discharged. A report which had been made in 1857, stated that the income from traffic exceeded the expenditure. This report was also handed to him. Several colonial Acts were passed, making grants of land to the company, all of which grants were to be dependent on the completion of the railway within a given time. One of the reports declared that the information given to the directors left them no doubt of completing the line within the time stipulated. The line, in fact, could not be, and was not, completed within the time. One of the Acts contained a direct divesting clause as to any grants of land if the railway should not be completed before a certain time. The opinion of a barrister in *England* had been taken on this Act, and he stated, that the land in question was liable to forfeiture if the railway should not be completed within the time. A bound-up copy of all the Acts was put into *A.*'s hands when he was making the inquiries, but he had not time to read them at the office. The various Acts, with the exception of the one which contained the divesting clause, were given to him to take away. He had the copy of the Act of Association, which recited fully every one of these Acts. He was not informed of the barrister's opinion. He afterwards became a shareholder in the belief, as he alleged, that the accounts were balanced, and paid every six weeks, and that the title to the land grants was indefeasible:

Held, affirming a decision of Vice Chancellor *Stuart*, and reversing a decision of the Lords Justices, that

COMPANY—continued.

on these facts he was not entitled to be relieved from his contract.—*New Brunswick, &c. Railway Company v. Conybears*, 9 H. L. Cas. 711.

Semble, that if the charge of equitable fraud had been sustainable against the directors, the company would not thereby have been rendered liable for their acts unless it had adopted them.—*Id.*

See *Kisch v. Venezuelan Company*, L. R., 2 H. L., 99, and *Oakes v. Turquand*, *Id.* 339.

5. The 8th part of the "Companies Act, 1862" (25 & 26 Vict. c. 89), includes and applies to all companies which had been registered other than, (as well as), companies registered under that Act itself. "Registered companies" there means registered under that Act itself; "unregistered companies," all those which had been registered under other Acts antecedently to its passing. Therefore, an insurance company which was formed in 1852, and registered under the Act of 1844 (7 & 8 Vict. c. 110), and which ceased to carry on business in 1855, was held to be capable of being made the subject of a winding-up order under the 25 & 26 Vict. c. 89.—*Botes v. Hope Insurance Company*, 11 H. L. Cas. 389.

COMPENSATION. See CANAL AND ROAD ACTS. MALICIOUS PROSECUTION. RAILWAYS.

1. Where damage is admitted, some compensation is due, and the Court must decide to what amount it ought to be given.—*Hall v. Ross*, 1 Dow, 201.

This was before the *Scotch Jury Acts*, 6 Geo. 4, c. 120; 11 Geo. 4 & 1 Will. 4, c. 69; 7 Will. 4 & 1 Vict. c. 14.

2. If a person in the execution of certain works in a highway, does that which may be the cause of damage to strangers who have a legal right to pass that way, and A. then leaves the place, and the opening is used by other workmen, not under his orders, and not working for his purposes but their own, and they neglect to secure it, and in consequence of the want of means of security, a stranger is injured, the action for compensation in damages for this injury will not lie against the person who

COMPENSATION—continued.

originally did the act which rendered the place dangerous.—*Milne v. Smith*, 2 Dow, 390.

A common staircase, in a house where there are many tenants, is sufficiently in the nature of a highway to support an action of this kind.—*Id.*

3. Where a particular jurisdiction is appointed under a Canal Act to determine all questions that may arise respecting things to be done in pursuance or in execution of the Act, if the canal proprietors do anything in a way not exactly according to the terms of the Act, and not strictly within the powers thereby given, the individual conceiving himself aggrieved, in applying for redress, is not limited to the particular jurisdiction; but the complaint is to be entertained by the ordinary jurisdictions, and the wrong to be redressed in the same way as other wrongs, upon the principle, that anything done not in exact conformity with the provisions of the Act, is not a thing done in pursuance and execution of the Act, and therefore not confined to the particular jurisdiction.

Sentiente, Lord Eldon, that though where a party stood looking on while an act not strictly legal was done, having the means, but without taking the proper steps, to prevent it, the remedy by injunction, which he would otherwise have, was gone; yet the company would be trespassing, and would be liable in damages; and that even if they entered on an individual's lands without authority, they were trespassers, and liable at least in nominal damages, because the act was unlawful.—*Shand v. Henderson*, 2 Dow, 519.

See *Edinburgh Railway Company v. Wauchope*, 8 Cl. & F. 710; *Rorke v. Errington*, 7 H. L. Cas. 617; *Ricketts v. Metropolitan Railway Company*, L. R., 2 H. L., 185.

4. Action against the trustees under a Road Act, for having, in the occupation of the pursuer's grounds, deviated from the line prescribed by the Act, and entered upon his lands without taking the proper previous steps, in terms of the Act, to give him notice, and settle the compen-

COMPENSATION—*continued.*

sation. The House of Lords held, that the line taken was authorised by the Act, but remitted to the Court below to review its judgment with reference to the question, whether the proper previous steps had been taken in terms of the Act; and if not, to consider what damages had been sustained in consequence.—*Goldie v. Oswald*, 2 Dow, 534.

Dicente Lord Eldon, that the trustees, under Road and Canal Acts, ought to be kept strictly within their powers; that they ought not to deviate in the smallest degree from the line prescribed by the Act; that though an injunction would not be granted where there was *laches* in applying for it, the trustees, if they deviated, would be liable in damages; and that if they entered on a person's lands without taking the previous steps incumbent on them under the Act, they would be liable, upon trespass, in damages and costs.—*Id.*

See *Agar v. Regent's Canal Company*, Coop. Ch. Cas. 77; *Roberts v. Hunt*, 15 Q. B. 17; *Reg. v. Inhabitants of Lordsmere*, *Id.* 689.

5. Where road trustees under an Act of Parliament do not follow the terms of their Act in entering the grounds of an individual, they cannot restrict him to seek compensation only from the tribunal specially created by the Act, but he may resort to the ordinary tribunals for that purpose.

And *semble*, that the amount of the compensation may be calculated on the value of the lands at the time when the valuation comes to be made, and not at the time when the lands were taken possession of by the road trustees.—*Burnet v. Knowles*, 3 Dow, 280.

See *Duncan v. Findlater*, 6 Cl. & F. 894; *Fees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507; *Coe v. Wise*, 5 B. & S. 448; *The Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686.

6. Whether compensation can, under the 5 & 6 Will. 4, c. 76, Municipal Corporation Act, be given for the profits of an office which the officer voluntarily resigned, *quare*?—*Parr*

COMPENSATION—*continued.*

v. The Attorney General, 8 Cl. & F. 409.

COMPOSITION.

1. *A.*, a creditor of a firm, held securities from one of its members for monies advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7*s.* for every 20*s.* due to the said creditors respectively." *A.* was the first to sign the deed, but added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed in their respective order, under *A.*'s signature:

Held, that such a composition thus accepted, did not affect the rights of *A.* upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity.—*Duffy v. Orr*, 1 Cl. & F. 253.

2. The execution of a trust deed for (among other things) the payment of creditors, does not constitute one of the creditors who became so after the execution of the deed, and was not a party to it, a *cestui que* trust, entitled to call on the trustee to execute the trusts of the deed.—*Latouche v. Lucan*, 7 Cl. & F. 722.

A. executed a trust deed, appointing *B.* trustee for certain purposes therein stated, one of which was for the payment of creditors, and another was to raise a sum of money by way of mortgage, in order to satisfy a claim for rent due in respect of *A.*'s lands, then about to be enforced by ejectment. *B.* obtained from *C.* an advance of money, with which he satisfied this claim. *B.* afterwards gave to *C.* a letter, written subsequently to, but dated before, the day of the advance, in which, appearing to ask for the advance, he said, "I will consider such advance as raised by me under the power given me; and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed." No security was ever executed by *B.*

Held, that *C.* did not stand in the situ-

COMPOSITION—continued.

ation of a *cestui que* trust under the deed, and could not maintain a bill in equity calling on *B.* to execute the trust of the deed.—*La Touche v. The Earl of Lucan*, 7 Cl. & F. 772.

See *Synnot v. Simpson*, 5 H. L. Cas. 121.

CONDITION. See AGREEMENT. BOND. COVENANT. CONTINGENT INTEREST. WILL.

1. A lease contained a covenant by the lessor to do certain work, and at the end of the covenant were these words, "and the whole of which is agreed to be left to the superintendence of the plaintiff and the defendant's son :"

Held, that this was neither a condition precedent to nor concurrent with the covenant.—*Jones v. Cannock*, 3 H. L. Cas. 700.

See *Smith v. Durant*, 9 H. L. Cas. 192.

2. The Earl of *Bridgewater*, by his will, devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord *Alford* for and during the term of 99 years, if he shall so long live;" remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of *C. H. C.* for the term of 99 years if he shall so long live;" remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of *C. H. C.*, subject, nevertheless, as to the several uses and estates so to be limited to Lord *Alford* and *C. H. C.*, and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared, "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord *Alford*, or of *C. H. C.*, in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being

CONDITION—continued.

my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord *Alford* and *C. H. C.* respectively." The testator then provided, "that if Lord *Alford* shall die without having acquired the title of Duke or Marquis of *Bridgewater* to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord *Alford* acquiring such title within five years after he should succeed to be Earl *Brownlow*, and unless he did so, the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord *Alford* were actually dead without issue male." Lord *Alford* entered into possession of the estates, but died, without acquiring either of the titles, leaving an heir male :

Held, that the estate thus created in favour of Lord *Alford*'s heirs male was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore that the eldest son of Lord *Alford* was entitled to the estates as heir male under the limitation.—*Egerton v. Brownlow*, 4 H. L. Cas. 1.

See *Clavering v. Ellison*, 7 H. L. Cas. 707.

3. *A.* became tenant to *B.* of a colliery, and also of some farm land, at distinct rents. The lease contained very numerous covenants as to payment of the rents, and as to the management of the real property. The term created was for 42 years, but the tenant was to have liberty to put an end to the term on giving 18 months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then

CONDITION—*continued.*

and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessee having been duly observed and performed), this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void But, nevertheless, without prejudice to any claims or remedies which any of the parties hereto may be entitled to for breach of any of the covenants or agreements hereinbefore contained." The Court of Exchequer had held that the proviso did not make the performance of all the covenants a condition precedent to the power to give notice to put an end to the lease. The Court of Exchequer Chamber held that the proviso did make the performance of the covenants a condition precedent. The Lords were equally divided, and so the judgment of the Exchequer Chamber stood affirmed. —*Grey v. Friar*, 4 H. L. Cas. 565.

See *Johnson v. The Great Northern Railway Company*, 10 Exch. 434.

4. There is no foundation for the doctrine that if there is a limitation in a will, which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise. —*Clavering v. Ellison*, 7 H. L. Cas. 707.

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning. —*Id.*

5. The burden of showing that conditions imposed by a railway company, under the 17 & 18 Vict. c. 31, s. 7, are just and reasonable, lies on the company. —*Peck v. The North Staffordshire Railway Company*, 10 H. L. Cas. 473.

6. What is or is not a condition precedent, depends, not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument. —*Roberts v. Brett*, 11 H. L. Cas. 337.

A. entered into a contract with B., by

CONDITION—*continued.*

which A. was "forthwith" to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay a sum of 1000*l.*; a farther sum of 2000*l.* in 21 days afterwards; and another sum of 2000*l.* on the ship arriving at the *Nore*. Certainly penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, and after all came a covenant, by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties" which he might incur under these presents, A. and two responsible sureties were "within 10 days from the execution of these presents," to execute a bond to B. in the penal sum of 5000*l.* There was a covenant in exactly similar terms on the part of B. The giving of the bonds was not to prejudice their mutual rights and liabilities under the agreement:

Held, that the covenant to give the bonds was a condition precedent, so that on B.'s refusal to allow A. to ship the cable, A., who had not given his bond, could not maintain an action for damages in respect of such refusal. —*Roberts v. Brett*, 11 H. L. Cas. 337.

The covenants to give the bonds were not mutual and dependent; the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract. —*Id.*

"Forthwith," in this contract, meant a reasonable time. —*Id.*

If the ship had been brought alongside on the day after the execution of the contract, and if the 1000*l.* had thereon been paid, A. would not have been thereby exempted from the obligation to give his bond within the 10 days. —*Id.*

CONFORMITY.

A certificate of conformity granted under the Popery Act, 2 Anne, c. 6 (*Ir.*), need not expressly use the words of the Act, "that the party had conformed." A statement which clearly describes the facts is sufficient. —*Loveland v. Lynch*, 2 Dow, 324.

See now 10 Geo. 4, c. 7.

CONSENT IN WRITING. *See* HUSBAND AND WIFE, 2. POWER.

In a deed executed by A. and B. there was a conveyance to certain persons with a power of sale, to be executed with the consent in writing of A. and B., or the survivor of them. A. died without having concurred in any consent to a sale. B. afterwards borrowed money from an insurance company, the repayment of which was secured by mortgage of his estates, of which those which were the subject of the first deed formed part. In the mortgage, to which the creditor under the first deed was a party, and which fully recited that deed, there was a power of sale given to the mortgagee :

Held, that this was a consent, in writing, sufficient to satisfy the words of the first deed.—*Montefiore v. Brown*, 7 H. L. Cas. 241.

CONSPIRACY. *See* COMPANY. CONTRIBUTING. JOINT-STOCK COMPANY. FRAUD. WINDING-UP ACTS.

If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished for conspiracy.—*Burnes v. Pennell*, 2 H. L. Cas. 497.

See *Bain v. Whitehaven Railway Company*, 3 H. L. Cas. 1 ; *Bargate v. Shortridge*, 5 H. L. Cas. 297 ; *Carron Company v. Maclaren*, 5 H. L. Cas. 416 ; *Oakes v. Turquand*, L. R., 2 H. L., 339 ; *New Brunswick Company v. Conybeare*, 9 H. L. Cas. 722 ; *Venezuelan Company v. Kisch*, L. R., 2 H. L., 111.

CONSTRUCTION OF FOREIGN INSTRUMENTS.

When a contract is made in a foreign country, and in a foreign language, an *English* Court having to construe it, must first obtain a translation of the instrument ; secondly, an explanation of the terms of art (if any) which it contains ; thirdly, evidence of the foreign law applicable to it ; and, fourthly, evidence of any peculiar rules of construction which may exist in that law ; and must

CONSTRUCTION, &c.—continued.

then interpret the instrument on ordinary rules of construction.—*Di Sora v. Phillipps*, 10 H. L. Cas. 624.

CONTINUANCE AND DISCONTINUANCE. *See* PRACTICE, 7.

The Court of *Queen's Bench* in *Dublin*, in *Hilary* Term, made an order for a trial at bar in that term, and another order declaring that in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial ; and that every day so appointed should be deemed a part of *Hilary* Term :

Held, that this order was properly made under the authority of the 1 & 2 *Will. 4*, c. 31, s. 3 ; and had the effect of duly continuing the trial during the days appointed.

After that order, which was entered on the record, a continuance was entered from the day in vacation on which the verdict was found, until the following term :

Held, that there was no discontinuance.—*O'Connell v. The Queen*, 11 Cl. & F. 155.

CONTINGENT INTERESTS.

A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and become void.—*Egerton v. Brownlow*, 4 H. L. Cas. 1.

CONTRACT. *See* COLONIES, 1. COVENANT, 1. LEASES FOR LIVES, 3. MASTER AND SERVANT. INSURANCE.

1. A lease of lime works contained a stipulation on the part of the lessor to furnish a certain quantity of coals of a particular sort from his collieries, and contained a proviso that the lessees "are not to be at liberty to purchase coals of any kind from any other coal works as long as they can be supplied at the above rates from the *Carland* Coal Works, under the penalty of 5 s. for every cart they shall get elsewhere ; and if the *Carland* coal stops, they are to build

CONTRACT—continued.

no more kilns." The Caraland Coal Works did not yield the quantity of coals required by the lessees :

Held, that the lessees could only resort to other collieries to make up the difference between what the Caraland Coal Works actually furnished and what they required, but could not go to other collieries for the whole of what they required.—*Wight v. Dickson*, 1 Dow, 141.

See *Strickland v. Maxwell*, 2 Cr. & M. 547.

2. *H.* contracted with *N.* to sell *N.* a certain quantity of spirits to be shipped on board, &c., at a certain price, payable at three months from the time of shipment. Before the purchaser found a vessel for the shipment, the 43 *Geo.* 3, c. 81 passed, and by that Act an additional duty was imposed on spirits. The vendor claimed under that Act to charge this additional duty against the purchaser :

Held, that he was entitled to do so.—*Haig v. Napier*, 1 Dow, 255.

3. *Haig* desired *Hannay* to engage a vessel for the conveyance of spirits, upon the understanding that the freight was, as usual, to be paid by the purchaser. There was no evidence of any authority given by the purchaser to *Hannay*, and therefore *Haig* the seller was held to be liable for the amount.—*Haig v. Hannay*, 1 Dow, 259.

4. The governors of *Heriot's Hospital* and the magistrates of *Edinburgh* sold to a private individual certain plots of ground for building. These plots lay in the intended line of a new street. A plan of the intended street, with some of the surrounding objects, was at the time exhibited to the purchaser. This plan represented the position of certain old buildings, which did not belong to the governors of the hospital or to the magistrates, and was supposed to represent these buildings to have been removed, and thus to represent the street as of an equal breadth throughout its whole extent. The charters or purchase deeds contained no covenant by the vendors as to the removal of these old buildings :

CONTRACT—continued.

Held, that the mere exhibition of the plan was no warranty that the vendors would remove the buildings, and could not be treated as an implied undertaking to be added to the charters or grants, which were altogether silent on that subject.—*Feoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301.

[This was expressly adopted by Lord *Cottenham* (Chancellor) in *North British Railway v. Todd*, 12 Cl. & F. 722.]

See *Bruce v. Wehnert*, 25 Beav. 348; *Piggott v. Stratton*, 1 De G., F., & J. 33; *Cooper v. Jarman*, L. R., 3 Eq., 99.

5. *M.* was the lessee under leases renewable for ever, of certain property in *Kerry*; he borrowed money, at first 300 *l.*, then 600 *l.*, from *D.*, upon conditions, which he afterwards alleged were usurious, by which he bound himself to grant leases for lives to *D.*, but there was a condition attached, to the effect that *M.* was to be at liberty to redeem on payment of 1300 *l.* *S.* purchased *D.*'s interest by paying the 1300 *l.*; he did so with the full consent of *M.* *S.* afterwards purchased *M.*'s interest, by paying him a farther sum of 3706 *l.*; the lands to which *S.* thus acquired the title were immediately afterwards let at a rental of 600 *l.* a year :

Held, that these circumstances alone did not entitle *M.* to ask to have the transaction set aside as fraudulent.

—*Merediths v. Saunders*, 2 Dow, 514. (*Mortlock v. Buller*, 10 Ves. 292, approved.)

See *Shrewsbury Railway Company v. North Western Railway Company*, 6 H. L. Cas. 113.

6. The owners of two adjoining estates having, the one coal fields, and the other coal, and salt works belonging to it proper for the consumption of small coal, entered into a contract for 124 years to carry on the working of the coal and salt as a joint concern, and executed leases to each other in order to carry this contract into effect :

Held, that the contract was valid, and that the persons succeeding to the estates of these two parties were bound by it, as an engagement at-

CONTRACT—continued.

tached to the succession.—*Warner v. Cunningham*, 2 Dow, 76.

See *Stuart v. Bute*, 1 Dow, 73.

7. The exhibition of a plan of a building or of a street does not of itself constitute a contract or engagement that all that is there represented will or must be done or adhered to, unless specially referred to and adopted in some other writing (in accord with *Gibson v. The Feoffees of Heriot's Hospital*, 2 Dow, 301).—*Gordon v. Marjoribanks*, 6 Dow, 87.

Therefore, where a free charter contained several restrictions as to buildings, but none as to building behind what was intended to be a line of houses in a new street; but it was alleged that such building would interfere with the original plan for the town, the erection of a kitchen, billiard room, and covered passage on the back area of a house in *St. Andrew's Square, Edinburgh*, was held not to constitute a public nuisance, so as to warrant the interference of the Court of Session by interdict.—*Id.*

8. *King* gave *Kemp* an undertaking in writing, in these words: "Mr. *Kemp*, when the title to the *Philpot-lane* estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3000*l.*, upon receiving a proper release from you and Mr. *Wilson*.—*John King*." The title was perfected, and the estate was conveyed to *King*, and he continued in the undisturbed possession thereof, but refused to account with *Kemp* for the 3000*l.* *Kemp* and *B.* filed a bill against *King*, alleging that the 3000*l.* constituted the consideration for *Kemp's* equitable interest in the estate, and for his procuring a conveyance of the same to *King*; that he borrowed money of *B.* on the assignment to him of the above undertaking, and that *Wilson* was *Kemp's* agent. *King*, by his answer, denied that *Kemp* had any interest in the said estate, or that he procured the conveyance of it to *King*, but he said that it was for *Wilson's* interest he agreed to give 3000*l.*, and that *Kemp's* name was used in the undertaking in order to protect *Wilson* from any claim by his assignees, he

CONTRACT—continued.

being an uncertificated bankrupt; that the dealing was with *Wilson*, and, through him, with the vendors of the estate:

Held, in the absence of proof of the allegations in the bill, that certain letters from *Wilson* to *B.* justified the inference that *Kemp* was not entitled to any account from *King* in respect to the undertaking; and the decree dismissing his bill was affirmed, with costs.—*Staley v. King*, 3 Cl. & F. 131.

9. The law of the country, where a contract is made, or is to be performed, furnishes the rules for expounding the nature and extent of its obligations. But the law of the country where it is sought to enforce performance of a contract, governs all questions as to the remedy and mode of proceeding, including lapse of time.—*Fergusson v. Fyffe*, 8 Cl. & F. 121.

See *Dow v. Lippman*, 5 Cl. & F. 1.

10. *A.* agreed with *P.*, in consideration of 165,000*l.*, to grant to *P.* a lease of certain mines, as trustee for a joint-stock company, which *P.* undertook to form; the consideration to be paid partly in shares in the company, partly in money to be raised by calls on the remaining shares. The lease was afterwards executed; and the company having been formed, with power to sue and be sued by one of the directors, entered into possession and worked the mines, and paid part of the purchase money. Upon *A.'s* death, *P.*, as his executor, filed a bill against *V.*, then managing director of the company, for an account and payment of what remained due to *A.* of the purchase money. *V.* answered, and then filed a cross bill on behalf of the company, setting forth various matters as evidence of misrepresentation, concealment, and other frauds practised by *A.* and *P.* on the company, and prayed that the consideration might be declared exorbitant and fraudulent, and that the company was entitled to a valid lease of the mines at their true reduced value: or, that the said agreement might be declared fraudulent and void, and the company discharged therefrom, and entitled to a

CONTRACT—continued.

lien on A.'s estates for the payments made to him :

Held, 1. That the company were not entitled to any relief from their contract by reason of acts and misrepresentations which proceeded from themselves, or were adopted by them and acquiesced in after full knowledge, while they continued to work and exhaust the mines.

2. That as the executed contract was not to be set aside, A.'s executor was entitled to the account and payment prayed by his bill.—*Vigers v. Pike*, 8 Cl. & F. 562.

11. Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.—*Bourne v. Gatliffe*, 11 Cl. & F. 45.

12. A letter offering a contract, does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract ; an answer posted on the day of receiving the offer is sufficient.—*Dunlop v. Higgins*, 1 H. L. Cas. 381.

A contract is accepted by the posting of a letter declaring its acceptance.—*Id.*

A person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post-office.—*Id.*

In an action for damages for breach of contract on the sale of goods, the measure of damages is not merely the amount of the difference between the contract price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed.—*Id.*

13. A contract between a railway company and a building contractor, stipulated that payments should from time to time, during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by

CONTRACT—continued.

the "principal engineer of the company, or his assistant resident engineer." In case of dispute between the contractor and the assistant resident engineer, the decision of "the principal engineer of the company" was to be final ; but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the principal engineer was a shareholder in the company. On a bill to have accounts taken, one of the grounds for which was this fact, then first discovered :

Held, that (no fraudulent concealment being alleged) it formed no ground for relief ; for that by contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. The case of *Dimes v. The Grand Junction Canal Company* (3 H. L. Cas. 759), held not to apply.—*Ranger v. The Great Western Railway Company*, 5 H. L. Cas. 72.

A contract or undertook to do certain works within a given term, or to pay certain fixed sums ; whether these were penalties or unliquidated damages, was not necessarily the subject of a bill in equity, but might properly have been decided in an action at law. The fact that a bond with a penalty had been given to secure the payment of them was itself strong evidence to show that they were liquidated damages.—*Id.*

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation, that if the company should think proper at any time to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating that, with the

CONTRACT—continued.

exception of that variance, all the provisions of that contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement :

Held, that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract.—*Ranger v. The Great Western Railway Company*, 5 H. L. Cas. 72.

In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant, and to finish the work ; the company acted on this clause :

Held, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages.—*Id.*

- [14. *W. M.* had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had been entered up, but not executed ; the bond and warrant of attorney came into the possession of *L.*, as personal representative of the original obligee. She was on terms of affectionate friendship with *W. M.*, and often said that he had been unfairly treated, in being made to enter into these securities. *L.* had in early life received from the father of *W. M.* a conveyance of some property in *India* ; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees : in truth the money consideration was, if any, a debt of 1200 rupees, the rest was a purely voluntary gift, and no money whatever passed, when the conveyance was executed. *W. M.* was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. *W. M.*'s father told *L.*, that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions, he said that *L.*

CONTRACT—continued.

promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of declarations by her that she "had abandoned" the claim, and of a promise, often repeated, that she would never trouble *W. M.* about it :

Held, that this promise, if it constituted a contract, was not a contract made "in consideration of marriage," so as to bring it within the words of the Statute of Frauds.—*Jorden v. Money*, 5 H. L. Cas. 185.

15. A cargo of corn was shipped by *A.* at *Salonica*, in February 1848, for delivery in *London*. On the 15th of May it was sold by *H.*, a *London* factor, who made the sale on *del credere* commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27*s.* per quarter free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c. upon handing shipping documents." In fact the corn had, a short time before the date of the contract, been sold at *Tunis*, in consequence of getting so heated in the early part of the voyage as to render its being brought to *England* impossible. The contract in *England* was entered into in ignorance of this fact. When the *English* purchaser discovered it, he repudiated the contract. In an action for the price brought by *A.* against the factor :

Held, that the contract contemplated that there was an existing something to be sold and bought, and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.—*Couturier v. Hastie*, 5 H. L. Cas. 673.

16. Railway company *A.* agreed with railway company *B.*, that in consideration of being allowed to use a part of *B.* line, the traffic on the part so used should be paid for according to a certain definite rate of toll, which was reduced below the ordinary amount. *A.* was afterwards amalgamated with other lines which had been made since the agreement was entered into, and its own amount of traffic was increased

CONTRACT—*continued*?

not only by those new lines, but by their bringing it into communication with some of the chief lines of the country. *B.* had also been amalgamated with other newly created lines. In both instances, the amalgamating acts had preserved all the "rights, powers," &c. of the original lines :

Held, that not only all the traffic which passed over line *A.*, having originated there, but all that which came on line *A.* having originated elsewhere, might pass, on payment of the reduced rate of toll, over the part of the line *B.*, which was the subject of the original agreement.—*Lancashire and Yorkshire Railway Company v. East Lancashire Railway Company*, 5 H. L. Cas. 792.

There were, however, cases in which company *A.* might deprive itself of the benefit of this agreement, as for instance, if company *A.* should, in consideration of any particular benefit or service to itself, grant to any one a free passage along the whole distance (including therefore the particular part of the line *B.* the subject of the agreement), in which case *B.* might claim payment independently of the agreement.—*Id.*

17. It is a principle of law, that parties cannot by contract oust the Courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant.—*Scott v. Avery*, 5 H. L. Cas. 811.

A. effected in a mutual insurance company a policy of insurance on a ship, one of the conditions of which was, that the sum to be paid to any insurer for loss should in the first instance be ascertained by the committee; but if a difference should arise between the insurer and the committee "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration, in a way pointed out in the conditions; "provided always, that no insurer who refuses to accept the amount settled by the committee; shall be entitled to maintain any action at law or

CONTRACT—*continued*.

suit in equity on his policy," until the matter has been decided by the arbitrators, and "then only for such sum as the arbitrators shall award," and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action :

Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount) till award made no action was maintainable.—*Scott v. Avery*, 5 H. L. Cas. 811.

18. A letter, answering and accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit and a day for completing the purchase; no reply was given to this letter :

Held, that there was no complete contract on which to sustain a bill for specific performance.—*Honeyman v. Marryat*, 6 H. L. Cas. 112.

19. *Primâ facie* all corporate bodies are bound by contracts under their common seal; but this *primâ facie* power to contract cannot be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or implicitly "by reasonable inference," prohibited from contracting. A contract as to such matters is *ultra vires*.—*Shrewsbury Railway Company v. North Western Railway Company*, 6 H. L. Cas. 113.

Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance.—*Id.*

A private Act of Parliament authorised one railway company to accept a lease of another railway; the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed "during the continuance" of such lease. No lease within the provisions of the Act was ever granted. The agreement appeared to be, if legally valid, at least unfair

CONTRACT—continued.

to the shareholders of one of the companies :

Held, that equity will not enforce it by a decree for specific performance.—*Shrewsbury, &c. Railway Company v. North Western Railway Company*, 6 H. L. Cas. 113.

20. If there is a signed paper, signed by an agent duly authorised thereto, which paper, though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds.—*Ridgway v. Wharton*, 6 H. L. Cas. 238.

The contract so constituted by the act of A.'s duly authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor to put it into form, provided that the agent and the person with whom he was dealing agreed that it should be sent for that purpose, but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form.—*Id.*

Long delay may prevent a party to an agreement from calling for specific performance of it.—*Id.*

What are circumstances sufficient to establish an agent's authority, and a contract made in the exercise of it.—*Id.*

21. There can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract, in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed. Therefore, a contract by the directors of one company to purchase the trade of another company is not binding, unless it is authorised by the deed of settlement of each company, and is made according to its provisions.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.
22. Where the law has declared the construction of a contract, a Court of

CONTRACT—continued.

Equity will not interfere to aid either of the parties merely on the ground of their own or their agent's dealings under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised and in due form ; if such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal.—*Midland Great Western Railway (Ir.) v. Johnson*, 6 H. L. Cas. 798.

23. If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo, as, for example, "one hundred quarters of wheat out of five hundred quarters which I have now sent," in either of these cases equity will interfere to enforce performance of the engagement ; but though the person who has made an engagement to sell a certain quantity of property, as, for example, one hundred quarters of wheat, may be shown to possess such a quantity of wheat, equity will not treat that particular wheat as liable under the engagement.—*Hoare v. Dresser*, 7 H. L. Cas. 290.
24. In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided that it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property as well as to real estate.—*Holroyd v. Marshall*, 10 H. L. Cas. 191. (See MORTGAGE, 16).
- Such a contract, if made with respect to future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who, in the case of personal property may have an injunction to restrain its removal.—*Id.*
25. Under a contract for the purchase of an estate when the money is to be paid in portions, every payment is a part performance of the contract by

CONTRACT—continued.

the vendee, and in equity transfers to him a corresponding portion of the estate.—*Ross v. Watson*, 10 H. L. Cas. 672.

CONTRIBUTION. See PARTNERSHIP. WILL.**CONTRIBUTORY. See JOINT-STOCK COMPANY. WINDING-UP ACTS.**

1. The 7 & 8 Vict. c. 110, does not create any new liability in an allottee of shares, beyond what his own contract imports.—*Hutton v. Thompson*, 3 H. L. Cas. 161; *Norris v. Cooper*, Id.

A. wrote a letter of application for shares in a railway company which was provisionally registered, and received an answer, in the usual form, declaring that certain shares had been allotted to him, on which he was required to pay a deposit. A. paid the required deposit, but neither signed the subscribers' agreement nor the parliamentary contract. The scheme was abandoned:

Held, that A. did not, by his letter of application for shares and by paying the deposits thereon, become a "member" of the company, or a "contributory," within the meaning of the Joint-Stock Companies Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever in fact be established.

Held, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list.—*Id.*

2. A projected railway company, provisionally registered, is within the meaning of the Winding-up Acts, which may therefore be applied to it if a Court of Equity shall so think fit.—*Bright v. Hutton*, 3 H. L. Cas. 341.

The liability of a person as a contributory under the Winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law.—*Id.*

Contributories are those only who have contracted, by themselves or agents, with a creditor, or who have agreed to indemnify or repay, in part or in

CONTRIBUTORY—continued.

all, those who have contracted with the creditor on their own account.—*Bright v. Hutton*, 3 H. L. Cas. 341.

- A. was a member of the provisional committee of a projected railway company, which had been provisionally registered, and the affairs of which were put under the authority of a managing committee. He accepted shares, and paid a deposit on them, but did no farther act. The scheme was abandoned:

Held, that on these facts he was not liable to a creditor for business done under the orders of the managing committee, towards completing the projected undertaking, and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts.—*Id.*

3. The name of a person who had purchased shares in a joint-stock bank was, after the stoppage of that, bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect.—*Henderson v. Sanderson*, 3 H. L. Cas. 698.

CONVERSION OF ESTATE. See CONTRACT, 24. SPECIFIC PERFORMANCE. WILL.**CONVEYANCE OF VOTERS. See BRIGHT. 21 & 22 VICT. c. 87, and 30 & 31 VICT. c. 102, s. 36.****COPYHOLD. See CUSTOM. WILL.**

1. An Act of Parliament incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; it authorised persons to "contract for, sell, and convey their lands," gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying, and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid to all intents, &c. S. was a tenant of copyhold land, a portion of which was wanted for the

COPYHOLD—continued.

purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of *S.* the lord made a proclamation for the heir of *S.* to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of *S.*, or such other person as the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and farther praying for a perpetual injunction and general relief. The Vice-Chancellor made a decree directing that the customary heir of *S.* (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed:

Held, that the decree of the Vice-Chancellor was right.—*Dimes v. The Grand Junction Canal Company*, 3 H. L. Cas. 794.

2. In ejectment for a forfeiture, by a lord against a copyholder of inheritance, for digging and taking clay from the manor, to be sold off the manor to anyone, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without license from the lord to break the surface and dig clay without limit, from and out of their copyhold tenements, for the purpose of making it into bricks to be sold off the manor:

Held (*dub.* Lord Wensleydale), that this custom was good in law.—*Salisbury (Marquis) v. Gladstone*, 9 H. L. Cas. 692.

COPYRIGHT.

The object of the 8 *Anne*, c. 19, was to encourage literature among "*British subjects*," which description includes such foreigners as, by residence here, owe the Crown a temporary allegiance; and any such foreigner first publishing his work here, as an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication.—*Jefferys v. Boosey*, 4 H. L. Cas. 815.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect.—*Id.*

An Englishman, though resident abroad will have copyright in a work of his own first published in this country.—*Id.*

B., a foreign musical composer, resident at that time in his own country, assigned to *R.*, another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country:

Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition.—*Id.*

Per Lords Brougham and St. Leonards: Copyright did not exist at common law. It is the creature of statute.—*Id.*

Per Lord St. Leonards: No assignment of copyright under the 8 *Anne*, c. 19, the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses.—*Id.*

Per Lord St. Leonards: There cannot be a partial assignment of copyright.—*Id.*

See *Houldsworth v. M'Crea*, L. R., 2 H. L., 380.

CORPORATION. See BOND. CHARTER.
DOMICILES. FISHERY, 2. FRAUD.
JURYMEN.

1. *H.* and *S.* were candidates for election to the office of alderman in the borough of *Salkash*. *H.* admitted that he had not taken the sacrament within the space of one year before the election, as required by the 13 *Car.* 2, stat. 2, c. 1, s. 12. *S.* stated that he had done so. Notice of these facts was then publicly given. After this notice the poll went on, and *H.* had 20, and *S.* had 16 votes. *H.* was sworn in by the mayor. Two of the aldermen insisted that *S.* was duly elected, and (having the right to do so) immediately afterwards swore in *S.* *H.* took the sacrament within the time limited by the Annual Indemnity Act of that year:

Held, that *H.* was at the time disqualified, and the votes given for him were thrown away; that in this state of things the swearing in of *S.* filled the office, so as to exclude the operation of the Indemnity Act in favour of *H.*—*Hawkins v. Rex*, 1 Dow, 124.

Quere, whether those who without notice had voted for a disqualified person might, on becoming acquainted with the fact, demand to vote again?—*Id.*

See *Scadding v. Lorant*, 3 H. L. Cas. 418; *Gosling v. Veley*, 4 H. L. Cas. 679.

2. Any master trader or manufacturer exercising his trade or calling within the new town of *Edinburgh* only, without exercising it in the old, is, by the proviso in the Act 7 *Geo.* 3, c. 27, exempted from the payment of the tax called entry money, exacted by the magistrates of *Edinburgh* from those who enter as burgesses.—*Sprott v. Scott*, 4 Dow, 290.
3. The King granted by letters-patent to the mayor and burgesses of *Lyme Regis*, the borough so called, and also the pierquay or cob, with all liberties and profits, &c. belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the mayor and burgesses, and their successors, all

CORPORATION—continued.

and singular the buildings, banks, sea-shore, &c. within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth, for ever should repair, maintain, and support:

Held, by the Lords affirming the judgment of the Courts of Common Pleas and King's Bench, that the mayor and burgesses having accepted the letters-patent or charter, became legally bound to repair the buildings, banks, and seashore; and that this obligation being one which concerned the public, an indictment would lie against them in case of non-repair, and an action on the case for a direct and particular damage sustained therefrom by any individual.—*Mayor, &c. of Lyme Regis v. Henley*, 2 Cl. & F. 331.

See *Ferguson v. Kinnoull*, 9 Cl. & F. 251; *Norris v. Irish Land Company*, 8 E. & B. 522; *Nicholl v. Allen*, 1 B. & S. 936; *Young v. Davis*, 7 H. & N. 765; *Mersey Docks, &c. v. Gibbs*, 11 H. L. Cas. 687; *L. R.*, 1 H. L., 99.

4. Certain local Acts of Parliament gave the corporation of the city of *Dublin* the power to take measures for supplying that city with water, and to levy rates and rents on the inhabitants to meet the expenses that might thereby be incurred. The corporation passed bye-laws, appropriating part of the revenue thus raised in a manner not strictly falling within the provisions of these Acts. Some of the inhabitants of *Dublin* filed an information against the corporation for an account, and the Court of Chancery in *Ireland* decreed an account, and held the corporation answerable for all sums which it had received and appropriated in a way not strictly conformable with the provisions of the local Acts. The House, on appeal, affirmed this decree.—*Corporation of Dublin v. The Attorney General*, 3 Cl. & F. 289.
5. A summons of declarator charged the Lord Provost, magistrates, and town council of *Glasgow*, with the breach of an agreement entered into

CORPORATION—*continued*.

by their predecessors with regard to the administration of a trust fund; and prayed "that the said Lord Provost, magistrates, and council, and A., B., C., D., &c.," reciting the names of every one of them, "for themselves, and as representing the burgh and community of *Glasgow*, ought to be decerned." The Court of Session pronounced an interlocutor, decerning "against the defenders in terms of the conclusion of the libel," declaring them liable in expenses, and specially directing that no part of the expense of this litigation should form a charge on the trust fund:

Held, that the interlocutor thus appearing to affect the interests of each individual member of the corporation, any one member was by law entitled to appeal against it.—*Gray v. Forbes*, 5 Cl. & F. 356.

6. The list of persons qualified to elect or be elected to municipal offices in the burghs of *Scotland*, must be made up on the 16th of September in each year, by the town clerk of each burgh, in conformity with the sheriff's list of parliamentary voters for such burghs.—*Monteith v. McGavin*, 5 Cl. & F. 459.

The town clerk has no authority to alter the burgh lists then made up, even upon intimation that the sheriff's list had been subsequently altered by the Court of Review, but such burgh lists must remain until the 16th of September in the following year, and then be altered in conformity with the then existing parliamentary lists for the burgh.—*Id.*

Where, therefore, a person's name stood on the sheriff's list on the 16th of September, and was transferred by the town clerk to the burgh list on that day, such person was entitled to elect and be elected to a municipal office in virtue of so appearing on the burgh lists, though before the period of the municipal elections his name had been, by the decision of the Court of Review, removed from the parliamentary lists made up by the sheriff.—*Id.*

Quære, whether in such a case his right to elect or be elected can properly be discussed in the Courts of *Scot-*

CORPORATION—*continued*.

land by a bill of suspension and interdict?—*Monteith v. McGavin*, 5 Cl. & F. 459.

7. A custom of the city of *London*, that when the inhabitants of any ward shall three times elect and return to the court of mayor and aldermen the same person to be alderman, who shall be, by the said court, according to another custom of the said city, adjudged on such three returns not to be a fit person to support the dignity and discharge the duties of the office, the mayor and aldermen may elect and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward, is a valid custom in law:

Held (affirming the judgment of the Court below), that this custom is not abrogated by the Act 11 Geo. 1. c. 18, "for regulating elections within the city of *London*," by which it is enacted that the right of election of aldermen, &c. for the several wards shall belong to freemen of the city, being householders of the wards, and to none other whatsoever. Nor by the bye-law of the city, 13 Anne, by which, after reciting that by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants thereof, having right to vote, were wont to choose one person only, being a freeman, to be alderman of the ward, and for reviving that custom, it was enacted, that thenceforth, in all elections of aldermen of the said city, at the wardmotes, there shall be elected only one able and sufficient citizen and freeman to be returned to the court of mayor and aldermen, which person so elected shall be by them admitted to the office.—*The King v. Johnson*, 6 Cl. & F. 41.

8. Where a party is in the legal and undisputed possession of a municipal office, it is competent for him, by suspension and interdict, to protect his office against the unauthorised intrusion of a party who has no title to the office; but it does not put into office a party who has the abstract right to it.—*Fleming v. Dunlop*, 7 Cl. & F. 43.

A bill of suspension and interdict is an incompetent procedure to try and determine the merits of contested municipal elections.—*Id.*

CORPORATION—*continued*.

Procedure by bill of suspension and interdict cannot be taken against a party in possession of an office, to question his right thereto, by a party who is not in possession; nor can it apply to a case where neither party is in possession, nor to acts done done anterior to the act of election; nor can the right of election be decided by it.—*Fleming v. Dunlop*, 7 Cl. & F. 43.

An interlocutor passing a bill of suspension and granting interdict, is subject to appeal to the House of Lords, within the 48 *Geo.* 3, c. 151.—*Id.*

9. By Act 5 & 6 *Will.* 4, c. 76, s. 71, it is enacted that all the estate and interest of such bodies corporate, or members thereof, as were seised or possessed of any real or personal estate in trust for charitable uses, should, in respect of such uses and trusts, continue in the persons who at the time of passing the Act (1833) were such trustees, until the 1st day of August 1836, or until Parliament should otherwise order, and should thereupon utterly cease and determine: provided that if Parliament should not otherwise direct on or before the said 1st of August the Lord Chancellor or Lords Commissioners of the Great Seal should make such orders as they should see fit, for the administration, subject to such charitable uses and trusts as aforesaid, of the said charity estates and funds. Parliament did not pass any subsequent Act on the subject before the 1st August 1836:

Held, that the administration of the charity estates and funds did not continue in the persons so described after the 1st of August 1836; and that it was competent to the Lord Chancellor, after that day, to make orders for the appointment of new trustees for their administration.

Orders made by the Lord Chancellor in the matter of such charitable estates and funds, by virtue of the said Act, and also of the Act 52 *Geo.* 3, c. 101, which last gives an appeal to the House of Lords, are subject to appeal.

Whether such orders made under the Act 5 & 6 *Will.* 4, c. 76, alone, are

CORPORATION—*continued*.

subject to appeal, *quære*?—*Bignold v. Springfield*, 7 Cl. & F. 71.

10. The Act 5 & 6 *Will.* 4, c. 76, creates a public trust of the property of municipal corporations, and of the funds raised for the purposes of the Act, subject, like other property held in trust, to the jurisdiction of the Court of Chancery.—*Parr v. The Attorney General*, 8 Cl. & F. 409.

Although the Act contains provisions for correcting abuses in respect of the borough property, there is nothing in it to exclude the ordinary jurisdiction of the Court of Chancery to prevent breaches of trust:

Held, accordingly, by the Lords (affirming the judgment of the Court of Chancery), that a bond given by the town council of a borough, to secure compensation out of the borough fund to an officer, for the profits of offices, some of which he continued to hold, was in breach of trust, and illegal.—*Id.*

Quære, whether compensation can, under the Act, be given for the profits of an office, which the officer voluntarily resigned?—*Id.*

See *Drogheda v. Holmes*, 5 H. L. Cas. 460.

11. The Convention of the Royal Burghs of Scotland exists under the authority of an Act passed in the reign of James III. (A.D. 1487). It consists of commissioners or delegates (from the Royal Burghs), meets annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjunct clerks of the Convention, and their appointments were declared to be "with benefit of survivorship," and "with survivancy to the longest lives of them;" and the office was given to them "as freely and fully as any of their predecessors had held it;" and the emoluments were declared to belong to one of them "during his natural life;" the other was to have the benefit of survivorship.

The Convention in one year raised the

CORPORATION—*continued.*

salary of its clerks; in another it lowered their salary below its original amount, and it also increased their duties. There were instances of express appointments "during pleasure," and of dismissals:

Held, by Lords *Brougham* and *Cottenham* (Lord *Campbell* dissenting): First, that this was not a life office, for that the expressions in the appointment were explained by the circumstances under which it was made; and secondly, that the salary might be raised or lowered at the pleasure of the Convention.

Per Lord Campbell: The Convention of Royal Burghs is a corporation: on the facts of this case, and the terms of the appointment, the office is granted for life, and the Convention cannot reduce the salary below its ancient and original amount. But the Convention can reduce to that amount, and may, perhaps, cast new duties on the officers.—*Convention of Royal Burghs of Scotland v. Cunningham and Bell*, 9 Cl. & F. 144.

12. A voluntary conveyance of real estates to a charity, is not defeated by a subsequent conveyance of them for valuable consideration.—*Mayor of Newcastle v. The Attorney General*, 12 Cl. & F. 402.

13. A proceeding by information, in the nature of a *quo warranto*, will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the assent of Parliament, provided the office be of a public nature, and is a substantial office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others.

The office of treasurer of the public money of the county of *Dublin* is an office for which an information in the nature of a *quo warranto* will lie.—*Darley v. The Queen*, 12 Cl. & F. 520.

14. Where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance. The

CORPORATION—*continued.*

omission to summon any one, renders the acts done at such meeting in his absence invalid. A finding in a special verdict that a person entitled to be present at a special meeting of a corporate body, was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting, the *onus* of showing a sufficient cause for his not being summoned. The election of treasurer for the county of the city of *Dublin* was vested by the 49 Geo. 3, c. xx., in "the board of magistrates of the county of the said city," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present:

Held, that the Recorder of *Dublin* was a member of that board, and ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid.—*Smyth v. Darley*, 2 H. L. Cas. 789.

15. A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed, through the agency of individuals, who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself.—*Ranger v. The Great Western Railway Company*, 5 H. L. Cas. 72.

16. By the 6 & 7 Will. 4, c. 100 (passed in August 1836), no conveyance of lands in certain corporations (of which *Drogheda* was one), was to be made, unless in pursuance of a covenant, contract, or agreement made, or a resolution of the corporation duly entered in the corporate books, before the 16th February 1836. This provision was continued by successive statutes, and incorporated into the 3 & 4 Vict. c. 108, and c. 109. The corporation of *Drogheda* had from time to time passed resolutions as to the granting of leases of the corporate property, and on the 20th April 1801 passed a resolution (which

CORPORATION—*continued*.

was duly entered in the corporate books), directing that "the auditors and viewers should on reporting on petitions for the renewals of leases take into consideration the value of the premises, and value the same at the full value between man and man, and that the petitioner so applying shall be then entitled to a renewal," on certain terms therein mentioned, "and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner than the then following quarter assembly." A lease had been granted in 1785 for 61 years; in 1841 a petition was presented for its renewal; the petition was referred to the auditors and viewers, whose report was presented on the 7th January 1842, and on the same day a resolution ordering the renewal was passed:

Held, that this was not a resolution which brought the case within the exceptions in the statute; for it merely bound the corporation to receive the report, and afterwards to consider the propriety of acting upon it. The resolution need not be a contract.—*Drogheda, Mayor, &c. v. Holmes*, 5 H. L. Cas. 460.

Per Lord St. Leonards: This resolution was insufficient, although it might not be necessary that the resolution should be such as would form a binding contract, enforceable in a Court of Equity; and farther, the resolution, such as it was, had not been complied with, for the lease was granted at the same meeting at which the report of the auditors and viewers was presented.—*Id.*

17. A bye-law of the Company of Saddlers declared that "no person who has become a bankrupt or otherwise insolvent, shall hereafter be admitted a member of the company, unless it be proved that such person, after his bankruptcy or insolvency, has paid his debts, or shall have exhibited a fair and honourable character for seven years subsequent to his bankruptcy or insolvency."

Held, that these words must be taken to mean not mere inability to pay debts in full, but inability proved by some outward act, a notorious or avowed insolvency, such as a public

CORPORATION—*continued*.

stoppage in business, or the calling together of his creditors, and obtaining time, or terms of indulgence, or entering into a deed of composition, so as to mark, as a distinct fact, a period of time from which the insolvency, like the bankruptcy, might be computed.—*Reg. v. The Saddlers Company*, 10 H. L. Cas. 404.

Per Lord Cranworth: This interpretation alone could make the bye-law good.—*Id.*

Where, therefore, a person, duly qualified as a freeman, was elected a member of the court, being at that time in insolvent circumstances, and was admitted to office, and was afterwards declared a bankrupt, it was held that he did not come within the meaning of the bye-law.—*Id.*

After election, but before being admitted, the person elected was asked by the clerk of the company (though it was not averred in the return, and did not appear in evidence, that the question was put by the authority of the Court) whether he was solvent, to which he answered, that he was as solvent as any member of the court, and could pay 20s. in the pound. This representation was false, and was afterwards made the ground of a resolution of the court, passed without notice to him, to remove him from office:

Held, that the insolvency here was not within the meaning of the bye-law; that the false representation was not one which affected his eligibility, and consequently that having been duly elected and admitted to the office, his removal without being heard in his defence was erroneous.—*Id.*

A person validly elected to an office and admitted to it, cannot be removed from it without notice.—*Id.*

The charter of the company gave the wardens and assistants thereof power to make such bye-laws as, according to their sound discretion, should be for the good government of the general body:

Per Lord Wensleydale: Under this charter a bye-law made by them would be valid, though it might have the effect of limiting the number of persons eligible to office by

CORPORATION—*continued*.

superinducing new qualifications, as to which the charter was silent.

And also—In order to show a valid objection to the admittance, after election, the return should have stated an insolvency within the true meaning of the bye-law.—*Reg. v. The Saddlers Company*, 10 H. L. Cas. 404.

See this case in another stage, 4 B. & S. 570.

COSTS. See PLEADING. PRACTICE.

1. The rule with respect to costs in the House of Lords, as in the Privy Council and in Chancery, is that there cannot be an appeal for costs alone, but if an appeal be brought on the merits, not on colourable grounds of appeal, for the purpose of raising the question of costs, the House will not treat that as an appeal for costs, but will even, in affirming the judgment of the Court below, consider the question of costs as fairly raised, and where there is hardship on the appellant, will reverse so much of the judgment of the Court below as gave costs against him.—*Inglis v. Mansfield*, 3 Cl. & F. 362.

See *M'Alay v. Adam and Brown*, 3 Cl. & F. 385; *Lautour v. Queen's Proctor*, 10 H. L. Cas. 693.

2. Where a trust disposition was obscurely worded, and the residue was very much larger than the disponent expected, the Lords ordered that the costs of all the parties should be paid out of such residue.—*Miller v. Rowan*, 5 Cl. & F. 99.

- 2a. In a case in which the question was as to the words of a will creating a trust for the benefit of *B. E. L.*, or being merely words recommendatory of him to the office of agent to *W. S.*, who was to take the estate:

Held, that as this case might have been discussed on demurrer without an inquiry into the fitness of *B. E. L.* for the situation of agent, the costs incurred by an inquiry of that sort in the Court below had been needlessly incurred, and should not be paid by *B. E. L.* to *W. S.*, but that each party should in that respect bear his own costs.—*Shaw v. Lawless*, 5 Cl. & F. 129.

COSTS—*continued*.

3. Costs are not given where an interlocutor is only varied.—*Taylor v. Hosack*, 5 Cl. & F. 381.
4. Where one of several purchasers who file a bill against the vendor to rescind a contract of purchase on the ground of fraud, is by amendment struck out as plaintiff, and made a defendant, and charged with collusion with the vendor, and that charge failing of proof, the bill is dismissed as against him, his costs ought not to be fixed on the vendor, although a decree is made against him rescinding the contract.—*Attwood v. Small*, 6 Cl. & F. 232.
5. Where an appellant has succeeded in dismissing a petition against the competency of his appeal, and the appeal is afterwards dismissed with costs on the hearing on the merits, those costs do not include the costs of discussing the question of competency, unless the consideration of them has been reserved.—*Campbell v. Campbell*, 7 Cl. & F. 166.
6. Where a transaction of a suspicious nature in its commencement, can only be sustained by subsequent acts of confirmation, the party so sustaining it must pay his own costs of the investigation into the circumstances.—*De Montmorency v. Devereux*, 7 Cl. & F. 188.
7. An appeal was called on in its regular course; the appellant's counsel was not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over, and ordered the appellant to pay the costs of the day.—*Godson v. Hall*, 7 Cl. & F. 549.
8. Where an interlocutor of the Lord Ordinary was appealed against, and overruled in the Court of Session, but the decree of that Court was afterwards reversed in this House, the House gave the appellant the costs incurred by him in the Court of Session.—*Thomson v. Mitchell*, 7 Cl. & F. 564.
9. A Court of Appeal will not entertain an appeal for costs alone. *Quare*, whether if a decree be appealed from on the merits, it is not competent for the respondent to present a cross

Costs—continued.

- appeal on the question of costs?—*Horne v. Pringle*, 8 Cl. & F. 264.
10. Where a party who is ordered to pay costs, absents himself to avoid personal demand and service of the certificate of the costs, the House will order substituted service on his agents in the appeal.—*Carter v. Palmer*, 8 Cl. & F. 708.
 11. The House will, as a general rule, make the costs of an appeal follow the affirmance of a judgment of the Court below.—*Stewart v. Menzies*, 8 Cl. & F. 309.
 12. Where a party is served with the certificate of costs and personal demand is made, and he does not pay them, the House will, on petition of the party entitled, order the recognizances to be estreated, for the purpose of enforcing payment of them, with costs of the petition.—*Callaghan v. Callaghan*, 8 Cl. & F. 709.
 13. Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.—*Sherburne v. Middleton*, 9 Cl. & F. 72.
 14. Where no person appeared on behalf of an appellant when his appeal was called on, and the agent only of the respondent appeared, alleging that he had retained counsel, and praying that the appeal might be dismissed with costs, it was so dismissed.—*Murphy v. Conway*, 9 Cl. & F. 73.
 15. An appellant had, under the decree of the Court below, paid the costs of the suit. That decree was reversed in this House, and the bill against the appellant ordered to be dismissed with costs. Still this House would not make an order for him to be repaid such costs, but left him to apply to the Court below, on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.
 16. The Lord Advocate of *Scotland*, or other officer of the Crown, suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite

Costs—continued.

- party, even though the suit may have been improperly instituted.—*The Lord Advocate v. Lord Dunglas*, 9 Cl. & F. 173.
- Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.—*Id.*
- And the Lord Advocate or other officer of the Crown, bringing that appeal, is not required to enter into recognizances to answer the costs of the appeal.—*Id.*
17. Where the judgment of the Court below is reversed in this House, and the House pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the appellant the costs of the suit in the Court below, which he would have had there, had the proper judgment been pronounced in the first instance in that Court.
 - This House never gives costs against a party coming to sustain a decree in his favour.—*Mackerey v. Ramsays*, 9 Cl. & F. 818.
 18. A declaration consisted of two counts. The defendants pleaded six pleas; four to the first, and two to the second count; all the pleas tendering issues of fact. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went down to trial on the issues, and a verdict was found for the plaintiff on the issues raised on the first count of the declaration; as to the issue on the second count, the jurors were discharged by consent. Judgment was afterwards entered for the plaintiff. On a writ of error to the Exchequer Chamber, that Court affirmed the judgment of the Common Pleas, except as to the general demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the second count. A general order was made for the defendants to pay costs to the plaintiff, but no order was made to except out of these general

Costs—continued.

costs the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute, for delay in the execution of his judgment, by reason of the writ of error. On error brought in this House,

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff.—*Bourne v. Galliff*, 11 Cl. & F. 45.

19. *Semble*, that on an appeal against a decree for mere matter of form, the House might affirm the decree in all other respects, but vary it on the point of form, and make the appellant pay the costs.—*Waters v. Groom*, 11 Cl. & F. 684.

20. A case was pending in this House; the defendant in a similar case made an offer to the plaintiff to be bound by the decision of the House in the case pending. The plaintiff took no notice of the offer, but compelled the defendant to go on with his defence. Judgment was given against the defendant; he brought an appeal to this House, and prosecuted it to a hearing after an adverse decision in the case previously pending. Judgment being given against him in his own case, he was ordered to pay the respondent's costs.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

21. Where a decree is varied by the House, but only on a point which was not raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.—*Wallace v. Patton*, 12 Cl. & F. 491.

22. After a judgment at law, finding payments made to a railway company to be overcharges, a bill filed pending a writ of error on that judgment, to restrain the company from continuing the overcharges for an account, &c., is not improper or premature, and the plaintiffs are entitled to costs.—*Barrett v. Stockton and Darlington Railway*, 1 H. L. Cas. 18.

Costs—continued.

23. The practice of allowing costs to be paid out of an estate may be, under certain circumstances, disregarded.—*Berry v. Morse*, 1 H. L. Cas. 71.

24. Although the general rule is to make the party seeking a redemption pay the landlord's costs, the Court has jurisdiction to look to the landlord's conduct, and to throw the costs on him according to its discretion.—*Gerahty v. Malone*, 1 H. L. Cas. 81.

25. In a case where the Crown would not be liable to costs, the judgment of the Court below, in favour of the Crown, was affirmed without costs.—*The Mayor of London v. The Attorney General*, 1 H. L. Cas. 440.

26. The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have been required to be tried as a question of fact.—*Piers v. Piers*, 2 H. L. Cas. 331.

27. An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of the House; the objection was in its nature fatal. The House, therefore, dismissed the appeal, but because the objection had not been taken till so late a period, dismissed the appeal without costs.—*Rockfort v. Battersby*, 2 H. L. Cas. 388.

28. The officers of State in Scotland obtained a judgment or interdict against an individual who had, by erecting a wall, encroached on the sea-shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but without costs.—*Smith v. The Officers of State for Scotland*, 2 H. L. Cas. 807.

29. The House ordered the costs of an appeal, in a case arising out of the construction of a will, to come out of the estate, but the trustee having unnecessarily printed certain docu-

Costs—continued.

- ments for the hearing of the appeal, the costs of such printing were disallowed.—*Prendergast v. Prendergast*, 3 H. L. Cas. 195.
30. The House, in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gave the costs in the Court below.—*Attorney General v. Cox*, 3 H. L. Cas. 240.
31. A petition to dismiss an appeal for incompetency, was itself dismissed. The costs were reserved.—*Geils v. Geils*, 3 H. L. Cas. 280.
32. In a suit for a divorce *a mensâ et thoro*, the wife obtained judgment in the Court below, with costs; that judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one, but the intercolutor was allowed to stand, so far as it gave the wife the costs in the Court below. The wife, however, was not allowed her costs in the appeal. *Quære?*—*Paterson v. Paterson*, 3 H. L. Cas. 308.
33. Where there had been a previous decree, in substance the same as that which was appealed against, but made in a different suit, and by a different judge, the appeal was dismissed with costs.—*Russell v. Dickson*, 4 H. L. Cas. 293.
34. Where, under special circumstances, the House discharged an order giving leave to appeal, and in that manner vacated a judgment pronounced upon that appeal, no costs were given, either to the party who had obtained the judgment which was thus vacated, or to the party who had succeeded in getting it vacated.—*White v. Tommney*, 4 H. L. Cas. 313.
35. By the Judges: Upon a judgment awarding a peremptory *mandamus*, the costs are not those awarded at the discretion of the Court, under sect. 6 of 1 Will. 4, c. 21, but are the general costs under sect. 4 of that statute.—*The Queen v. The Directors of the South Eastern Railway Company*, 4 H. L. Cas. 471.

Costs—continued.

36. The Court of Exchequer, on an information filed by the Attorney General for legacy duty, had held, on the construction of a will, that *L.* took an estate tail. On a bill to carry into effect the trusts of the will, the Vice Chancellor held that *L.* took a life estate only. The Vice Chancellor's decision was affirmed; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate.—*East v. Twyford*, 4 H. L. Cas. 517.
37. An order of the Vice Chancellor was reversed, but the party who obtained the reversal, having omitted to bring before his Honor a document on which that reversal was founded, the order was reversed without costs.—*Terrell v. Hutton*, 4 H. L. Cas. 1091.
38. In an information against the donees of a fund on which there was a charge for the benefit of a charity, the prayer of the information was granted, and inquiries were directed. This House reversed the decree of the Court below, and ordered the information to be dismissed, but only with costs up to the hearing, upon the ground that the Court below having directed the inquiries, the relator was entitled to proceed upon that direction.—*Mayor, &c. of Southmolton v. The Attorney General*, 5 H. L. Cas. 1.
39. One part of a decree was held to be sufficiently doubtful to justify an appeal against it; but as to another part of the same decree, the appellant having sought to obtain a construction of articles of agreement, which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs.—*Wilson v. Wilson*, 5 H. L. Cas. 40.
40. As part of the decree of the Court below was sustained, and part was reversed, no costs were given.—*Torre v. Browne*, 5 H. L. Cas. 555.
41. The decree of the Court below was varied, but only as to a small extent, not the material subject of the appeal:
Held, therefore, that the appellant

Costs—continued.

must pay the costs of the appeal.—*Savery v. King*, 5 H. L. Cas. 627.

42. Costs of a preliminary objection to the course of proceeding reserved till the hearing of the cause itself.—*M'Mahon v. Lennard*, 5 H. L. Cas. 931.

43. A testator devised lands for certain charitable purposes. The will was disputed, not on the obscurity of its terms, but on the question whether the devise was or was not void under the Mortmain Act. The costs were ordered to be paid out of the estate.—*Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

44. In a dispute between two joint-stock companies where the question was as to the power of the directors of these companies to make a contract on behalf of their respective companies, each company was ordered to pay its own costs.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

45. A rule for taxation of costs, and an *allocatur* thereon, do not amount to a "rule" or "order" within the meaning of the 1 & 2 Vict. c. 110, s. 18, so as to be capable of being registered as a judgment. The rule absolute for payment of the costs does come within the enactment.—*Shaw v. Neale*, 6 H. L. Cas. 581.

An indenture was executed by *N.* to *R.*, at that time *N.*'s attorney, to secure what was then due to *R.*, and also future advances. This indenture was made a first charge on *N.*'s property. *S.*, who had previously been *N.*'s attorney, obtained against *N.* a rule absolute for payment of costs found due on the Master's *allocatur*; he registered this rule, and thus became a second incumbrancer. *R.* then became largely *N.*'s creditor for costs subsequently incurred:

Held, on an order allowing *S.* to redeem *R.*, that these subsequent costs could not be taken into the account.—*Id.*

46. Where a judgment of the Court below was affirmed on appeal, the House (though not entirely approving of the conduct of the respondent) affirmed it with costs, they being a

Costs—continued.

legal consequence, and not a result necessarily affected by the conduct of the parties.—*Clarke v. Hart*, 6 H. L. Cas. 633.

47. As to costs when the Order of the House is neither a simple affirmance nor a simple reversal of the judgment of the Court below, see note to *Cooper v. Slade*, 6 H. L. Cas. 798.

48. Two appeals in the same interest and raising the same point were presented. One set of appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will, yet, as there had been two separate appeals when one would have been sufficient, the House refused to make any order as to costs.—*Ricketts v. Carpenter*, *Abbott v. Middleton*, 7 H. L. Cas. 68.

49. An appeal against a sentence of the Probate Court was dismissed; as there had been faults on both sides, the dismissal was ordered without costs.—*Dolphin v. Robins*, 7 H. L. Cas. 390.

50. On the final discussion of the *Thellusson* will with regard to the meaning of the words, "eldest male lineal descendant," the costs of all parties were ordered to come out of the Estate.—*Thellusson v. Rendlesham*, 7 H. L. Cas. 429.

51. There had been an objection to the competency of an appeal. The Appeal Committee directed it to be argued before the House. The appeal was declared competent. The case was then heard, and the appeal dismissed on the merits with costs. The costs incurred on the objection to the competency were directed to be deducted from the general costs.—*Lambert v. Peyton*, 8 H. L. Cas. 1.

52. A question arose on the sufficiency of an attestation to a will. No misconduct was imputed. The judgment of the Court below was affirmed. No costs were given.—*Hindmarsh v. Charlton*, 8 H. L. Cas. 160.

Costs—continued.

53. A decree was made in the Court below. There was a division of opinion among the Lords, but the majority of their Lordships thought that the decree must be affirmed, and the appeal dismissed. No costs were given.—*Wing v. Angrave*, 8 H. L. Cas. 183.
54. An information was filed by the Attorney General upon an address to the Crown from the House of Commons. It was dismissed. No costs were given.—*The Attorney General v. The Dean and Canons of Windsor*, 8 H. L. Cas. 369.
55. In a case where the Lords Justices had been divided in opinion as to the correctness of a decree of the Vice-Chancellor, the Lords, on affirming the judgment, did not give the costs of the appeal.—*Simpson v. The Westminster Hotel Company*, 8 H. L. Cas. 712.
56. The Lords differed in opinion, so no costs were given.—*Monypenny v. Monypenny*, 9 H. L. Cas. 114.
57. By a deed, made under a power of appointment, a sum of money was directed to be paid to a married woman for her sole use and benefit, and her receipt alone was to be a discharge. She mortgaged her interest in this money, and afterwards joined with her husband and the mortgagees in a litigation relating to the deed. The decision was adverse to them. The order made this sum expressly liable to the costs :
Held, that the order was right.—*Newton v. Ricketts*, 9 H. L. Cas. 262.
58. A. in 1699 granted to B. a lease for lives, renewable for ever. This lease, by the death of B. intestate, vested in his four daughters. The interest of three of them became, in 1778, vested in C., who got possession of the whole of the property ; but upon D., who claimed one undivided fourth part, filing a bill in Chancery against C., he, in 1779, agreed to accept, and D. consented to grant him, a lease of that undivided fourth part for 999 years, at an annual rent of 40*l*. The lives in the original lease dropped in 1784, but all the parties went on for years acting upon its terms. Up to 1828 the

Costs—continued.

- rent on the lease of 1779 had been duly paid. D. died, having first devised her interest in that lease to E. The representative of C. then asserted a claim to the whole property, and refused to pay the rent of 40*l*, and E. did not take any steps to enforce its payment. In 1835, the representative of C. obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, E. became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease :
Held, that E. was entitled in equity to this relief, but considering his delay in enforcing his rights, the decree was ordered to be made without costs.—*Archbold v. Scully*, 9 H. L. Cas. 360.
59. Where the autograph will of an illiterate man occasioned, by the language used in it, the difficulty of construction, the costs were ordered to come out of the estate.—*Hall v. Warren*, 9 H. L. Cas. 420.
60. Costs in a suit where there had been conflicting claims of jurisdiction between the Court of Chancery and the Court of Session, were ordered to come out of the estate.—*Stuart v. Bute (Marquis)* 9 H. L. Cas. 440.
61. Costs of appeal ordered to be added to a mortgage security.—*Eyre v. McDowell*, 9 H. L. Cas. 619.
62. Where parties charge fraud and fail upon that charge, the bill ought to be dismissed with costs.—*New Brunswick, &c., Company v. Conybeare*, 9 H. L. Cas. 711.
63. A Court of Equity in deciding on a case relating to the construction of a doubtful Act of Parliament, held that the case involved matter which might properly be made the subject of litigation, and so gave no costs. The House, though varying the order of the Court below in one matter, did not disturb it in that respect.—*Elliot v. The North Eastern Railway Company*, 10 H. L. Cas. 333.

COSTS—continued.

64. Under peculiar circumstances the House will order the costs of all the parties to come out of the general personal estate.—*Bective (Countess) v. Hodgson*, 10 H. L. Cas. 656.

COUNSEL. See BARRISTER. DEFAMATION. PRACTICE.

1. A client was by the Court of Session made liable for defamatory expressions used by his counsel in Court with reference to the agent of the client's adversary :

The House of Lords reversed this part of the decree of the Court below, and remitted the cause to have it corrected.—*Robertson v. Graham*, 3 Dow, 273.

See *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Flint v. Pike*, 4 B. & Cr. 473; *Swinfen v. Chelmsford (Lord)*, 3 Hurl. & N. 909.

2. A counsel in a cause being afterwards raised to the Bench, is not thereby precluded from taking part in the hearing and decision of that case; but he may properly (unless his doing so would entail great inconvenience and expense on the parties, or perhaps from his being, as in Chancery, the sole judge of the Court, amount to a denial of justice) decline to take part in such hearing and decision.—*Thellusson v. Rendelsham*, 7 H. L. Cas. 429.

See also *Di Sora v. Phillips*, 10 H. L. Cas. 624, 633, 642.

COVENANT. See BOND. LEASES FOR LIVES. MARRIAGE SETTLEMENT.

1. An administratrix having a lease for years of church lands, with a covenant for perpetual renewal, sublet them to M. at a certain yearly rent, with a covenant that as often as she obtained a renewal from the Archbishop she would renew to M., his executors, &c., under a penalty of 70*l.* :

Held, that the penalty was of the essence of this contract.—*Magrane v. Archbold*, 1 Dow, 107.

2. Covenant in a marriage settlement that if the intended husband should, under his grandfather and grandmother's will, become entitled to the

COVENANT—continued.

estates therein mentioned, or any other estates, for any estate of inheritance in possession, or otherwise capable of being settled or bound in law or equity, he would settle to the use of the marriage. He became entitled in possession to a life estate under the grandmother's will. He was tenant in tail male in remainder of an estate under the will of his grandfather, but his right here was defeated under a recovery :

Held, that the life estate was not bound by the covenant in the settlement.—*Willis v. Robinson*, 1 Dow & C. 469.

3. Where a lease contains a personal covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property, and so far as relates to rent previously due is not affected by the surrender; but the lessor remains a specialty creditor for the rent which accrued due before the surrender.—*Attorney General v. Cox*, 3 H. L. Cas. 240.

See *Ward v. Lumley*, 5 Hurl. & N. 87.

4. Where a man in his marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" shall become vested in possession, he will convey it to the uses of the settlement, if he should become possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it. (*Noel v. Bewley*, 3 Sim. 103, doubted).—*Smith v. Osborne*, 6 H. L. Cas. 375.

5. *Quære*, whether, when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant?—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

6. A lease of the Opera House contained covenants on the part of the lessee :

First, not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the

COVENANT—*continued.*

end of the season of 1852, and was not opened at all during the following year :

Held, that this was not a breach of the covenant.—*Croft v. Lumley*, 6 H. L. Cas. 672.

Second, not to grant away, assign, dispose of, &c. the stalls or boxes "for any longer period than one year or season." On the 21st December 1851, the lessee leased certain boxes for one year, to commence from March 1852. On the 1st August 1852 he made another lease of the same boxes to a different person, with this *habendum*, "from the 1st February now next ensuing, or from such subsequent day during the year, upon which the theatre shall be opened, and thenceforth for the full term of one year to be computed from that day":

Held, that this was not a breach of the covenant.—*Id.*

Third, "not to charge nor incur the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same or granting any rent-charges or any other incumbrances whatever." The lessee was greatly in debt. In respect of his debts he granted warrants of attorney (one of which was to secure payment of bills not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered), and judgments were signed against him on those warrants of attorney, and upon Judge's orders, and registered :

Held, that no breach of this covenant had been committed.—*Id.*

A lessee tenders money in payment of rent due, and requires that it shall be accepted as rent; the lessor refuses so to accept it, but says that he will accept it as compensation for past occupation, and (each party still continuing to assert what is his own intention on the matter) takes up the money. *Quære*, whether this amounts to a waiver of a previous right of re-entry on a forfeiture for breach of covenant? And *quære*,

COVENANT—*continued.*

whether a waiver will operate upon breaches not known at the time?—*Croft v. Lumley*, 6 H. L. Cas. 672.

Semble, that where a clause of re-entry is "if the lessee shall make default of or in the performance of all or any of the other covenants," &c., a non-observance of negative covenants will entitle the lessor to re-enter.—*Id.*

7. The grantee, by deed of settlement on marriage, of an annuity charged upon certain lands, in which deed the grantor declares himself entitled in fee simple to the lands charged, may treat such declaration as a covenant; and, on its afterwards appearing that the grantor had really only a life estate (there being no fraud), may proceed against his estate to obtain payment of the arrears of this annuity.—*Monypenny v. Monypenny*, 9 H. L. Cas. 114.

P. M., the uncle of a person about to marry, became a party to the marriage settlement, which recited that he proposed and agreed to secure to the intended wife, in case she should survive him, an annuity to be payable out of the manors mentioned in the settlement, "of or to which he is seised or entitled in fee simple." The granting part witnessed that he granted this annuity payable out of the lands of &c., to which he, or any person in trust for him, "is seised or entitled for an estate of inheritance at law or in equity;" *habendum* to the intended wife for her life, subject to a mortgage, and also subject to any provision he had made or might make in favour of his own wife. The grantor covenanted "for himself, his heirs, and assigns," with the grantee, "her executors, administrators, and assigns," that in case of the annuity falling into arrear, it should be lawful for "her executors, administrators, and assigns" to distrain. For farther security he created a term in trustees, granting them a like power of distress. After the grantor's death it was discovered that he had only possessed a life estate in the larger part of the premises. The annuity fell into arrear :

Held, (*diss. Lord St. Leonards*), that

COVENANT—continued.

the deed of settlement must be construed as containing a covenant for title; that the covenant for himself made his executors liable, as there was nothing to qualify it, and, as by the failure of the grantor's estate, the right to distrain did not exist, the grantee was entitled to come on the personal estate of the grantor for satisfaction of the annuity.—*Monypenny v. Monypenny*, 9 H. L. Cas. 114.

After the discovery of the defect in the grantor's title, a small part of the lands charged (of which part the grantor had been seised in fee) was sold, the grantee of the annuity received the purchase-money in part discharge of arrears:

Held, that this did not destroy her right to proceed on the covenant.—*Id.*

Per Lord St. Leonards: She had thereby elected to treat the annuity as a rentcharge, and could not afterwards proceed to recover it as a mere annuity.—*Id.*

CREDITOR. See COVENANT, 3. DEBT 1.

CROPS. See MORTGAGE. SALE.

CROWN.

1. The office of Chamberlain and Collector of Revenues, payable to the Crown out of *Etrick* Forest, was granted by Geo. IV. to Lord D. for his life, with a yearly salary, "as well in consideration of the office as out of royal bounty and favour," to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary always exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *George IV.*:

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension to endure beyond the life of the royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord Dunglas*, 9 Cl. & F. 173.

Semble, 1. That the officers of State in *Scotland* are the proper parties to

CROWN—continued.

institute process to set aside an illegal grant of the property of the Crown in that country.

2. That such process, brought by the Lord Advocate in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.

3. That in such process, the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*The Lord Advocate v. Lord Dunglas*, 9 Cl. & F. 173.

Where the Crown, by any of its officers, is a party respondent in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply, after the reply for the appellant.—*Id.*

The Lord Advocate of *Scotland*, or other officer of the Crown, suing on behalf of the Crown, or on matters in which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted.—*Id.*

Against any judgment awarding such costs, an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.—*Id.*

And the Lord Advocate, or other officer of the Crown bringing that appeal, is not required to enter into recognizances to answer the costs of that appeal.—*Id.*

See *The Corporation of London v. The Attorney General*, 1 H. L. Cas. 440; *Smith v. Officers of State*, 2 H. L. Cas. 807; 18 & 19 Vict. c. 90; 25 & 26 Vict. c. 14.

2. In a case where a party had presented an appeal, and the Attorney General, on behalf of the Crown, had presented a cross appeal against the same decree, the counsel for the private party were heard fully on both appeal and cross appeal, and then the counsel for the Crown were on both, and the senior counsel for the private party was heard in a general reply; though the case was one in which, being a matter of revenue, the Crown was directly

CROWN—continued.

concerned.—*Drake v. The Attorney General*, 10 Cl. & F. 259.

3. *Semble*, that the Courts lean strongly towards applications for farther investigations, in cases in which property falls to the Crown; as that generally happens not from want of next of kin, but from failure of legal evidence of their title.—*Robson v. The Attorney General*, 10 Cl. & F. 471.
4. The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property, therefore, in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.—*Mersey Docks Board v. Cameron, Gibbs v. Mersey Docks Board*, 11 H. L. Cas. 443.

CROWN NOMINEE. *See* SOLICITOR OF TREASURY.

CURTESY, *See* INTEREST. MORTGAGE.

A person who becomes tenant by curtesy of a mortgaged estate is bound to keep down the interest on the mortgage, and arrears of interest will be converted into principal from the date of such tenancy, and will be considered a charge on the estate.—*Ruscombe v. Hare*, 6 Dow, 1.

CUSTOM. *See* EVIDENCE, 2. HIGHWAY. INSURANCE. MANOR. TITHE.

The Commissioners of Accounts appointed under 20 Geo. 3, c. 54, having recommended the abolition of the office of the 19 king's waiters in the Customs, the number from that period was not filled up, and the fees of the vacant offices were generally applied to the use of the Customs' Superannuation Fund (now abolished by 51 Geo. 3, c. 55), though without any legislative authority. By 38 Geo. 3, c. 86, the vacant offices of waiters were abolished subject to regulation, and the fees for such offices received previous to July 1798, were ordered to be applied to the fund. The appellant was appointed receiver in 1799; but as the Act 38 Geo. 3 made no provision for the appropriation

CUSTOM—continued.

of the fees of the vacant offices subsequently to 1798, he retained them in his own hands. By 47 Geo. 3, sess. 1, c. 51, the fees of offices, vacant and abolished under 38 Geo. 3, c. 86, received since July 1798, were directed to be applied to the fund. An information was, in 1807, then filed in the Exchequer against the appellant for the fees which he still refused to pay, alleging that they ought not to have been received at all, and might be reclaimed by the merchant, or that if receivable they belonged to the surviving king's waiters, &c. But it was held that the fees were consolidated, and properly received from the merchant in full, but that the offices were separate and distinct, and that the fees did not go to the surviving waiters; and the Court below decreed for the Crown for principal, interest, and costs. But on appeal, though the appellant had admitted in his answer below that he had mixed this money with his own, and so derived profit from it, the Lords held that, as the money remained unappropriated till 47 Geo. 3, interest ought not to be demanded during the period between 1798 and 1807; and that, as it was a fair question whether the money did not belong to the surviving waiters, the appellant ought not to be called upon to pay costs to the Crown.

The Lords were of opinion that this being public money, might be sued for by the Attorney General in his own name alone; but that, as the managers of the fund had been added as relators upon the suggestion of the appellant himself in his answer below, whether the information was objectionable in a general view on that ground or not, he was precluded from availing himself of that objection.—*Mucklow v. The Attorney General*, 4 Dow, 1.

CUSTOS ROTULORUM. *See* CLERK OF THE PEACE.

DAMAGES. *See* COMPENSATION. DIRECTION. RAILWAY. ROAD AND CANAL ACTS.

1. If charity trustees are guilty of a breach of trust, the person thereby

DAMAGES—continued.

injured has no right to be indemnified by damages out of the trust fund. The law is the same in this respect both in *England* and *Scotland*.—*The Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507.

2. Persons who have a duty to perform, and who may be made responsible for injuries if they know, but do not remedy, causes of mischief which may occasion them, are equally responsible if they negligently remain ignorant of those causes of mischief, and so leave them unremedied.—*Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686.

A private person, or a company, having a right to levy tolls in respect of the performance of a particular work, will be liable in damages for injuries occasioned by performing it improperly (*Parneby v. The Lancaster Canal Company*, 11 Adol. & Ell. 223, approved).—*Id.*

A corporate body authorised to perform such a work, and receiving tolls in respect of it, though obtaining no profit itself from such tolls, but collecting them for the maintenance of the work, and the future possible benefit of the public, is equally liable for injuries arising from the proper performance of such work, and the funds thus obtained must discharge that liability.—*Id.*

Per Lord Westbury: Trustees may render the property of the beneficiaries liable to third persons for an act done by them in the exercise of their trust.—*Id.*

Per Lord Westbury: Some of the observations of Lord Cottenham in *Duncan v. Findlater* (6 Cl. & F. 894), commented on and controverted.—*Id.*

Metcalf v. Hetherington (11 Exch. 257; 5 Hurl. & N. 719) discussed.

Mersey Dock Trustees v. Gibbs, Same v. Penhallow, 11 H. L. Cas. 686.—*Id.*

DATE. See **BAIL**.

DEBTS. See **CREDITORS. MERCHANTS' ACCOUNTS.**

1. A. granted an annuity; he left a will. His executor administered the assets in payment of debts of a date

DEBTS—continued.

previous to the grant of the annuity, but declined to pay the arrears of the annuity. There was still considerable property remaining, and a bill was filed to compel the executor to pay out of this property. He set up as a defence, that the grant of the annuity was voluntary, and ought to be postponed to the payment of all just debts, and that it was a grant made *pro turpi causa*, the plaintiff having been in cohabitation with the testator, his wife being still alive. The Master of the Rolls ordered an inquiry; the order was reversed by the Lord Chancellor, but was restored, on appeal to the House of Lords.—*Hunt v. Maunsell*, 1 Dow, 211.

2. Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title.—*Colyer v. Finch*, 5 H. L. Cas. 905.

DECISION OF THE HOUSE OF LORDS. See **HOUSE OF LORDS.**

DECLARATORS. See **PRESCRIPTION.**

Semble, by Lord Eldon (Lord Chancellor), that an adjudication with infettment, and 40 years' possession after the expiry of the legal, though without a declarator, forms a good title by prescription, independent of a Crown charter.—*Robertson v. Athol (Duke)*, 3 Dow, 108.

DECREES. See **REGISTRY ACTS.**

James S., on the 6th October 1855, made an equitable mortgage of his estate to *E.* This mortgage was not registered. On the 25th August 1856, *D.* obtained a decree in the Court of Chancery against the estate of *James S.*, and on the 7th November 1856 registered this decree as a mortgage under the 13 & 14 Vict. c. 29 (*Ir.*):

DECREES—*continued.*

Held, that this registration had not the effect, under the provisions of the statute, to give a priority to the decree over the equitable mortgage to *E.*—*Eyre v. McDowell*, 9 H. L. Cas. 619.

A registered judgment, under the provisions of the 3 & 4 Vict. c. 105 (*Ir.*), and the 13 & 14 Vict. c. 29 (*Ir.*), only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and therefore does not displace the interest of a previous equitable mortgage.—*Id.*

M'Auley v. Clarendon, Dru. Cas. temp. Nap. 433, approved of.—*Id.*

In re Hamilton, 9 Ir. Ch. Rep. (N.S.) 512, dissented from.—*Id.*

DEED. See FAMILY ARRANGEMENT. HUSBAND AND WIFE. REGISTRATION.

1. The name of one of the attesting witnesses to a deed was written on an erasure. The word "witness," added to the name, was in a different handwriting. The person who bore the name deposed that the name upon the deed was in his handwriting, but he remembered nothing of the circumstances attending the attestation:

Held, that by the law of Scotland this was *ex facie* a vitiation of the attestation in *substantialibus*, and judgment for the reduction of the deed was affirmed.—*Walker v. Gibson*, 2 Dow, 270.

2. A person having the legal estate in certain premises as trustee, and an equitable and beneficial interest in the same estate, executes a deed which might be construed either as purporting to pass both estates, or only the equitable estate, which alone he had a right to convey:

Held, that the instrument should be construed as intending to pass only the estate which he had a right to convey, for a party shall be presumed to have intended to do only that which he had a right to do, provided that the instrument be fairly and reasonably capable of

DEED—*continued.*

that construction.—*Fausset v. Carpenter*, 2 Dow & C. 232.

See Sugd. Vend. & Pur., 13 ed., 611; Sugd. Law. of Prop. 76.

3. A portion of an entailed Scotch estate was sold by the tenant in possession for the redemption of the land-tax, and the money invested in the terms of 42 Geo. 3, c. 116. The heir of entail next entitled sold, for valuable consideration, his reversionary and contingent right to the interest of this fund, and assigned it to the purchaser by a deed prepared in the English form, and executed in England, where both the parties were domiciled, but without the solemnities required by the law of Scotland:

Held, affirming a decision of the Court of Session, that the interest of the money was moveable property, and was, therefore, well assigned by an English deed.—*Scott v. Alhault*, 2 Dow & C. 404.

4. Where parties to a deed of settlement contemplate several states of circumstances, and there is found, on the face of the instrument, a clear and distinct expression of intention to provide for one event, which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events or states of circumstances which have not happened.—*Dill v. Haddington*, 8 Cl. & F. 168.

5. In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others; secondly, that forfeiture will be incurred by non-performance of that condition; and thirdly, that the donee may be subjected to loss by the performance of that condition, are sufficient to raise the presumption that, in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase.—*Jack v. Burnett*, 12 Cl. & F. 812.

DEED—continued.

See *Southmolton v. The Attorney General*, 5 H. L. Cas. 1; *Beverley v. The Attorney General*, 6 H. L. Cas. 310; *The Attorney General v. The Dean, &c. of Windsor*, 8 H. L. Cas. 369.

6. Lands held in fee simple were, by settlement made in 1752, conveyed to trustees to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first and other sons successively, in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common; in case of two survivors, with remainder in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; and in case one or two of the settlor's daughters should die *without issue*, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion:

Held, that the limitation, in case of the failure of issue generally, of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and therefore not void for remoteness. And also, that the words, "survivors or survivor," were to be read, "others or other," and consequently the limitation over to the daughters of one of the settlor's daughters' daughters who had issue, was not defeated by the death of that daughter in the lifetime of another who subsequently died without issue, but that limitation

DEED—continued.

took effect as a good cross remainder.
—*Cole v. Sewell*, 2 H. L. Cas. 186.

One only of the settlor's daughters had issue, four daughters and no son; *L. E. S.*, one of the four, in 1779, while her sisters, mother, and aunts were living, executed a post-nuptial settlement, which recited the said deed of 1752, and another of 1749, under which she was entitled to a vested estate tail in lands called the B estate, on the death of her father; and that she was entitled in remainder or reversion expectant, and to take effect in possession on the determination of certain prior estates, to several parts of lands in the deed of 1752 mentioned. It also recited a post-nuptial settlement of 1776, in which were recited *L. E. S.*'s title to certain shares in remainder or reversion expectant, &c., and her desire to limit and assure the same; and that it was thereby witnessed, that in order to bar the estates in remainder or reversion expectant, and to take effect in possession as aforesaid, *then vested in her*, but without prejudice to the prior estate, she and her husband covenanted to levy fines of her said undivided shares in remainder, to enure to these uses, namely, that the trustees should, out of the hereditaments comprised in the deeds of 1749 and 1752, *first falling into possession*, take an annuity of 300 *l.*, and out of those *next falling into possession*, a similar annuity, both being for *L. E. S.*'s separate use, and subject thereto, to the use of her husband for life, remainder to herself in fee. It further recited that no fines were levied under the deed of 1776, and that *L. E. S.* was desirous of securing payment of certain debts, and, subject thereto, of settling the said remainders and reversions expectant, and to take effect as aforesaid, for the benefit of her two children, and had agreed to settle the same, and all her right and interest in the premises, to the uses thereafter mentioned; and it was by the deed of 1779 witnessed, that in order to bar the estate tail in remainder or reversion expectant, upon and to take effect as aforesaid, *then vested in L. E. S.*, on the hereditaments comprised in the deeds of

DEED—continued.

1749 and 1752, without prejudice to the prior estates, the said *L. E. S.* and her husband covenanted to levy fines of all her undivided shares in remainder or reversion expectant, and to take effect as aforesaid in the said hereditaments, to enure to trustees for 1000 years to raise the amount of the aforesaid debts; remainder to other trustees for 1500 years to raise 5000*l.* for *L. E. S.*; remainder to other trustees for 2000 years to raise an annuity of 100*l.* out of the lands *first falling* into possession, and a similar annuity out of those *next falling* into possession, for maintenance of her only son; remainder to trustees for 3000 years, to raise 3000*l.* for her only daughter; remainder to the use of the son and his issue in strict settlement; remainder to the use of the daughter and her daughters in tail:

Held, that all the estates and interests, contingent as well as vested, in the lands to which *L. E. S.* was entitled under the limitations of the deed of 1752, passed and were bound by the deed of 1779, and the fines that were levied in pursuance thereof.—*Cole v. Sewell*, 2 H. L. Cas. 186.

The settlor's three daughters died; one in 1784, *s. p.*, another, the mother of *L. E. S.*, in 1793, the third, in 1799, *s. p.*, all intestate and without having disposed of the reversion vested in them by descent. One of *L. E. S.*'s sisters died in 1788, intestate and without issue. In 1809 one-third of the lands comprised in the deed of 1752, was, on petition, allotted to *L. E. S.*, and by a decree for sale made in 1820, in a suit instituted against her by the trustees of the term of 1000 years comprised in the deed of 1799, it was declared that the whole of the one-third so allotted was subject to the trusts of the term, and bound by that deed, and the fines levied in pursuance thereof. By a deed executed in 1825, it was witnessed, that for barring all estates tail therein mentioned, and settling the lands therein comprised, *L. E. S.* and her husband, and a trustee of the deed of 1779, conveyed all the said one-third part, so allotted in severalty, to *L. E. S.* as aforesaid, and also her undivided third part of

DEED—continued.

the B estate (which had then by the death of her father come into possession) to a trustee, that recoveries might be suffered of the said lands; and it was covenanted that they should enure, as to such of the said undivided parts as were comprised in the deed of 1779, to the uses therein mentioned, and in confirmation thereof, and of the term of 1000 years; and after reciting that three specified denominations of lands of which *L. E. S.* was stated to be seised in tail in remainder, at the date of the deed of 1779, were not comprised therein or in the fines levied in pursuance thereof, and reciting the said suit and decree for sale therein made, and that *L. E. S.* had agreed to make the said denominations subject to the said term; it was further agreed and declared that the said recoveries should enure to confirm the sale of the said three denominations for the said term, and to give validity to the said decree, and, subject to the said term, to such uses as *L. E. S.* should appoint; and as to the lands comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as *L. E. S.* should by deed or will appoint:

Held, that by this deed, and the recoveries suffered in pursuance thereof, the whole of the lands allotted in severalty to *L. E. S.* on the partition, except the said three denominations, were made subject to the uses of the deed of 1779.—*Cole v. Sewell*, 2 H. L. Cas. 186.

See *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Evers v. Challis*, 7 H. L. Cas. 531; *Parker v. Tootal*, 11 H. L. Cas. 143.

7. *J. S.* under his marriage settlement was seised of certain estates in the county of *Clare* for life, remainder to his sons successively in tail, subject to a charge of 5000*l.* as a provision for younger children. *B. S.* and *W. S.* were sons of this marriage, and there was a daughter *Diana*. *J. S.* afterwards purchased other estates, one of which was called *K.*, which in 1806 he mortgaged to the Bishop of *Elphin*. In February 1807 he executed a deed, by which,

DEED—continued.

assuming to be the owner in fee of *K.*, he conveyed it and other lands to trustees for himself for life, then to *B. S.* for life, and to *B. S.*'s sons successively in tail. This deed contained a covenant on the part of *B. S.* to pay *J. S.*'s debts, and to discharge a sum of 2000*l.* which *J. S.* had undertaken to pay to two children of *Diana*; and also an assignment by *J. S.* of his personal estate in favour of *B. S.*, who was thereby appointed the attorney of *J. S.*, with power to call in all debts. The deed was registered (apparently without the knowledge of *J. S.* or of *W. S.*) upon the 1st June 1807. On the 13th of that month, by a deed to which *J. S.*, *B. S.*, two trustees, and *W. S.* were parties, *J. S.* granted, and *B. S.* confirmed, to the trustees the lands of *K.* to *J. S.* for life, then to *W. S.* for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed *W. S.* gave up his share of any benefit from the provision for younger children contained in his father's marriage settlement, or otherwise. This deed was registered a few days afterwards. *J. S.* died in November 1808, and *W. S.* entered into possession of the lands of *K.* *W. S.* married in 1815, and *B. S.* was a party to his marriage settlement, in which the lands of *K.* were included, and by which, under the power contained in the deed of June 1807, *W. S.* created a jointure for his wife. *B. S.* paid his father's debts, satisfied the mortgage on the lands of *K.*, obtained a reconveyance of them to himself, and died in 1837, having allowed *W. S.* to remain in undisputed possession of them up to that time. *W. S.* continued in possession, and died in 1843. The son of *B. S.* claiming under the deed of February 1807, brought ejectment against the son of *W. S.*, who relied upon the deed of June 1807 for his title. At a trial of this ejectment the jury found that the deed of February 1807 was a voluntary deed, and that of June 1807 was given for valuable consideration. The Court of Queen's Bench in *Ireland* refused

DEED—continued.

a new trial, but a new action was brought, and a verdict given on the ground that the deed of June was for value. On another trial being had the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was then filed by the plaintiff in the Court of Chancery there, to have the trusts of the deed of February 1807 carried into execution, and that Court made a decree to that effect:

Held, that the decree was right; that after what had, on the last occasion, occurred at law, it must be assumed that the deed of February 1807 was given for a valuable consideration, and that the deed of June 1807 was a voluntary deed. And farther, that the subsequent marriage of *W. S.*, and the circumstances attending it, did not constitute his children purchasers for value under the deed of June 1807, which could not prevail against an earlier and a previously registered deed that had been executed for valuable consideration.—*Scott v. Scott*, 4 H. L. Cas. 1065.

8. A deed contained a power of sale of certain family estates to be exercised with the consent, in writing, of *A.* and *B.*, or the survivor of them. *A.* died without having, in the terms of the first deed, consented in writing to a sale. *B.* afterwards mortgaged property of which these estates formed part. The creditor under the first deed was a party to the mortgage, in which a power of sale was given to the mortgagee:

Held, that this was a consent in writing sufficient to satisfy the words of the first deed.—*Montefiore v. Broune*, 7 H. L. Cas. 241.

9. A deed reserving a power was executed in 1841. A deed exercising the power thus reserved was executed in 1850. These deeds, though executed at an interval of nine years from each other, must be treated as constituting but one disposition.—*Braybrooke (Lord) v. The Attorney General*, 9 H. L. Cas. 150.

10. A deed of conveyance, made under the authority of an Act of Parlia-

DEED—continued.

ment, must be read as if the sections of the Act were incorporated in it.—*Elliot v. North Eastern Railway Company*, 10 H. L. Cas. 333.

A conveyance granting land for a special purpose, must be construed as conveying all the rights necessarily incident to the execution of that purpose.—*Id.*

Whether the conveyance is a voluntary bargain between the parties, or is made because the Act gives the grantee the power of compelling the grant, these rules are applicable.—*Id.*

DEFAMATION. See LIBEL. PLEADING, 33-40.

Quære, whether a wife can maintain an action against a third person for words occasioning to her the loss of the consortium of the husband?

Per Lord Campbell (Lord Chancellor): she can.—*Lynch v. Knight*, 9 H. L. Cas. 577.

If she can, the words must be such that from them the loss of the consortium follows as a natural and reasonable consequence. *Dub. Lord Wensleydale.*—*Id.*

Where, therefore, a wife (her husband being joined for conformity as a plaintiff) brought an action to recover damages from A. for slander uttered by him to her husband, imputing to her that she had been almost seduced by B. before her marriage, and that her husband ought not to let B. visit at his house, and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the consortium of her husband:

Held, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special damage did not show (in the conduct of the husband) a natural and reasonable consequence of the slander.—*Id.*

(*Allsop v. Allsop*, 5 Hurl. & Nor. 534, confirmed.)

Per Lord Campbell (Lord Chancellor): though a case is of first impression, if it shows a concurrence of loss and damage arising from the act com-

DEFAMATION—continued.

plained of, the action will be maintainable.—*Lynch v. Knight*, 9 H. L. Cas. 577.

The loss by the wife of her maintenance by the husband, occasioned by slander uttered by a third person, may be made the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred.

(*Vicars v. Wilcocks*, 8 East, 1, observed upon).

In such a case, though the act of the husband in sending away his wife was wrongful, because the slander was false, the fact that it was false cannot be taken advantage of by the slanderer as an objection to the husband appearing on the record as a plaintiff.—*Id.*

Observations on the unsatisfactory state of the law with regard to slanders on women.

DEFICIENCY.

A testator directed his brother A. B. (whom he appointed his executor and trustee) to get in his estate, and to stand possessed of the produce thereof, on trust, to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when invested, the dividends should "realise the clear annual income or sum of 200*l.*," and to pay to "my wife such dividends, interest, or annual income," &c.; for her life or widowhood. On her death or second marriage, A. B. was to stand possessed "of the said principal or trust money, and the stocks upon which the same shall be invested," in trust for himself and the other brothers and sisters of the testator. And as to the residue, "after raising thereout the money sufficient to realise the annuity for my said wife," A. B. was to stand possessed thereof on similar trusts; provided that if the testator should die leaving children, the trusts for his brothers and sisters were to be null, and the children were to take the whole. The estate when got in and invested did not produce 200*l.* a year:

Held (reversing the decision of the Court below), that the widow was

DEFICIENCY—continued.

not entitled to have the deficiency made good out of the *corpus* of the estate.—*Baker v. Baker*, 6 H. L. Cas. 616.

A certain portion of the fund itself had, under the order of the Court below, been sold to make good the deficiency; the House, on reversing the order, directed the widow to replace that portion.—*Id.*

DELAY. See LIMITATIONS, STATUTE OF. RENEWABLE LEASES, &c.**DELIVERY ORDER. See LIEN.**

The giving a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it of his right of lien for their price, even as against the claims of a third person who has *bonâ fide* purchased them from the original vendee.—*M'Ewen v. Smith*, 2 H. L. Cas. 309.

S., the owner of sugars, sold them to *B.*, to whom he gave a delivery order, addressed to his agent *A.*, and took a bill of exchange in payment of the price. *B.* sold the sugars to *M.*, and transferred to him the delivery order. The sugars were in the warehouse of *L.*, in whose books they were entered as received by him "from *A.* on account of *S.*" The sugars were weighed and invoiced by *A.*, upon the order of *S.* Neither *B.* nor *M.* took any steps to act on the delivery order, till a rumour arose of *B.*'s insolvency, when *M.* presented the order to *A.*, and received from him a fresh order, addressed to *L.*, the warehouse keeper. Before the sugars could be actually delivered under this order, *A.* removed them under the direction of *S.*:

Held, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that *S.* might still impose upon them his lien as vendor.—*Id.*

DEMESNE LANDS. See CROWN. MANOR.**DENMARK. See MARRIAGE.****DEVISAVIT VEL NON. See HEIR, 7.**

A verdict having passed against an heir, on the trial of an issue of *devisavit vel non*, a Court of Equity was held properly to have refused him a new trial.—*McGregor v. Topham*, 3 H. L. Cas. 132.

DIRECTION. See EXCEPTIONS, BILL OF. PRACTICE.

A. bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on *A.*'s estate. At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property, that locality, and all other circumstances must be taken into consideration; and that in counties where great works have been, and were, carried on, parties must not stand on extreme rights:

Held, that the direction was right.—*St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642.

DIRECTORS. See FRAUD. RAILWAY COMPANY.

1. A banking company was established under the 7 Geo. 4, c. 46. By the deed of settlement of the company, it was declared that no transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a board of directors such consent to be signified by a certificate in writing signed by three directors at the least. If such consent was refused, the share-

DIRECTORS—*continued*.

holder might require the directors to buy his shares at the market price of the day. After a consent given, the name of the transferee was entered in the share register book, and the entry there was conclusive against him. No shareholder could compel an inspection of the books of the company. *S.* was a shareholder; he desired to transfer his shares to different individuals, and he sent the proper notices to the directors; he received back consents signed by three directors, on which he completed the transfers; the transferees' names were entered in the share register book; and the returns made to the Stamp Office under the 7 Geo. 4, c. 46, omitted the name of *S.* from the list of shareholders, and inserted it in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings, &c. The directors subsequently sought to impeach these transfers, on the ground that the notices had never been submitted to a "board of directors," nor the consents given by such "board," but that the consents had merely been examined by the managing director alone, then signed by him, and afterwards signed by two other directors. It appeared that this mode of transacting the business of the company had existed ever since the formation of the company:

Held, affirming a judgment of the Master of the Rolls, that such being the case, the directors could not in this instance set up their own want of observance of the formalities required by the deed as a ground on which to fix *S.* with liability as a continuing shareholder; their course of dealing bound them, and he was released.—*Bargate v. Shortridge*, 5 H. L. Cas. 297.

A creditor of the company had sued the company and obtained judgment, and then at the desire of the directors, had issued a *sci. fa.* against *S.*; *S.* obtained an injunction to prevent the creditor from enforcing the judgment as against *S.*

Per Lord St. Leonards: where a company has, under the Act of 7 Geo.

DIRECTORS—*continued*.

4, c. 46, made use of a creditor to proceed against a person, as a shareholder, when that person ought not properly to be placed in that position, he is entitled to relief.

If directors of a company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect the acts which are within their authority, and which they ought to perform, neither a court of law nor of equity will allow them afterwards to take advantage of their own neglect.—*Bargate v. Shortridge*, 5 H. L. Cas. 297.

2. In a contract for the sale of land for the purposes of a projected railway, the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, and the projectors of the railway undertook to obtain from Parliament powers to enable him to make a good title:

Held, that where they did not fulfil this stipulation, or but for their own default the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

But (*per Lord Campbell*) though an individual vendee may consent to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the proprietors, can do so.—*Id.*

Semble, that where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller.—*Id.*

3. *Quare*, whether when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant?—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

DISCLOSURE OF FACTS. *See* BOND. FRAUD. PRINCIPAL AND AGENT.

The assignee of a chose in action or

DISCLOSURE OF FACTS—continued.

security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognisant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries, and who has not made them.

But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself.—*Mangles v. Dixon*, 3 H. L. Cas. 702.

DISCOVERY, BILL OF. See PLEADING. PRACTICE.

A bill of discovery in aid of a defence to an action cannot be sustained against a person who is not a party to the record, although charged in the bill to be solely interested in the subject of the action.—*Queen of Portugal v. Glyn*, 7 Cl & F. 466.

Bills filed by or against underwriters, praying some relief, do not form an exception to the rule; for if to a bill of discovery in aid of a defence to an action brought on a policy of insurance by the agent alone, his principal is made a defendant, he may demur, although he is exclusively interested in the subject of the action.—*Id.*

Bills of discovery are permitted for the purpose of obtaining from the adversary at law a discovery of matters, which being admitted by him, may aid the defence to the action; not for the purpose of obtaining evidence; and accordingly a bill of discovery does not lie against a person who may be a witness for the defence in the action.—*Id.*

DISCOVERY, BILL OF—continued.

A loan raised in 1833, for *Don Miguel*, as King of *Portugal*, for the use of his government, consisted partly of bills of exchange, in two parts, drawn upon bankers in *London*, who accepted the first parts in the course of their business, for a customer. The second parts, having been remitted to the treasury of *Portugal*, indorsed to the treasurer of the royal treasury there on account of the loan, came, after the dethronement of *Don Miguel*, into the possession of Queen *Donna Maria*, and were by her orders indorsed by the treasurer to *Soares* in *London*, with instructions to recover the amount. An action having been brought by *Soares* on the bills, against the acceptors, they filed a bill of discovery in aid of their defence, against him and the Queen of *Portugal*, charging that she was interested in the bills of exchange:

Held, by the Lords (reversing an order of the Court of Exchequer), that as the Queen of *Portugal* was not a party to the record at law, she was not a proper party to the bill of discovery.—*Queen of Portugal v. Glyn and Gowers*, 7 Cl. & F. 466.

DISSENTERS.

1. By deeds executed in 1704, *Lady Hewley* conveyed estates to trustees, upon trust, to pay out of the rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of Christ's holy gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's holy gospels, as the trustees for the time being should think fit; and to dispose of such sums and in such manner, for promoting the preaching of Christ's holy gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of Christ's holy gospel, as the trustees for the time being should approve and think fit; and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her and the trustees' charity, as

DISSENTERS—*continued*.

the trustees for the time being should think fit. And she directed that when any one of the trustees should die, the survivors should elect in his place such a person as they, in their judgments and consciences, should think fit to be a trustee.

By other deeds executed in 1707, Lady *Hewley* conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; and after directing that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she ordered the residue of the rents to be applied, upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her for the selection of the old people for the almshouse, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion, and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and *Baroli's* Catechism.

At the dates of the deeds, all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees, most of whom were Unitarians, and they applied the rents for the benefit of Unitarians, and that sect became tolerated by law:

Held, by the Lords, affirming judgments of the Court of Chancery on an information filed in 1830, that neither Unitarians nor members of the Church of *England*, but Protestant Dissenters only, were entitled to the benefit of the charities; and that all the trustees were properly removed, as all had concurred in the misapplication of the charity funds.—*Shore v. The Attorney General*, 9 Cl. & F. 355.

2. A school was founded in the reign of *Edward VI.* at *Iminster*, and the trust declared was, first, for the teaching of "literature and godly learnings," and, as it was elsewhere expressed, "godly learning and knowledge." The deed then went on to direct that if, upon taking the

DISSENTERS—*continued*.

accounts in October of each year, there should be, after providing for this purpose, any surplus, then the trust, secondly, was for the mending and repairing the highways, bridges, and watercourses of the parish. When the trustees were reduced to four, they were to make up the number to 20, by appointing "other honest persons of the said parish of *Iminster*." For a period of 156 years Dissenters had been admitted with Churchmen to the management of the trust. The Master of the Rolls held, that Dissenters, as such, were not excluded from being appointed trustees. The Lords Justices reversed that decision, and declared that Dissenters ought not to be appointed. On appeal, the Lords being equally divided, the order of the Lords Justices was affirmed.

The costs of the appeal were ordered to come out of the fund.—*Baker v. Lee*, 8 H. L. Cas. 495.

DISTRESS. See REVERSION.

DISTRIBUTIONS, STATUTE OF.

On the marriage of *A.*, a certain sum was settled in trust for her for life, "as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal, or freehold," of her intended husband:

Held, affirming the decree of the Court of Chancery of *Ireland*, that this settlement barred her claim on the personal estate of her intestate husband, under the Statute of Distributions.—*Gurly v. Gurly*, 8 Cl. & F. 743.

DIVORCE. See MARRIAGE.

1. A husband, immediately after his wife's elopement, brought an action, and obtained a verdict for damages against the adulterer, and also proceeded against the wife in the Ecclesiastical Court, and obtained a divorce there, but did not for five years from the elopement apply for a divorce in Parliament. The delay was held to be sufficiently ac-

DIVORCE—continued.

counted for by the absence of the wife in *America*, and by the inability of the husband in consequence of his affliction to attend to any business.—*Heavyside's Case*, 12 Cl. & F. 333.

2. A husband lived separate from his wife for many years without making any provision for her maintenance from his means, which were sufficient :

Held, that he was not entitled to a divorce, though the adultery of the wife was clearly proved.—*Simmon's Case*, 12 Cl. & F. 339.

3. In prosecuting a divorce bill, letters written by the wife admitting her adultery, but imputing the blame to her husband for neglecting her, and exposing her to temptation, are to be regarded more as excuses invented to palliate her guilt than as founded in truth, and therefore do not require strong rebutting evidence. The husband's attendance at the bar on the second reading of his bill for a divorce, in compliance with the Standing Order, No. 142, may be dispensed with, on petition of his attorney shewing sufficient reasons for his non-attendance.—*Shulldham's Case*, 12 Cl. & F. 363.

4. A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer, upon the statement of the witnesses, that they did not find him until three years after the discovery of the adultery, and the petitioner was not able to pay the expenses of an action. A lapse of 16 years from the adultery made no objection to the application for divorce at the end of that time.—*Martin's Divorce*, 1 H. L. Cas. 79.

5. The wife's general bad conduct was admitted as an excuse for the husband's omitting to bring an action against the adulterer. A lapse of eight years from the discovery of the wife's adultery, till the petition for a divorce was presented, was held to be sufficiently accounted for by the husband's inability to bear the expenses of a divorce bill.—*Brook's Divorce*, 1 H. L. Cas. 159.

6. The enforcement of the Standing

DIVORCE—continued.

Order of the House (No. 142), requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health. The acceptance by the petitioner in a divorce bill of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default in an action of *crim. con.*, against the wife's paramour, held, under the circumstances, not to be a bar to the bill.—*Heneage's Divorce*, 1 H. L. Cas. 496.

7. Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *a mensâ et thoro*.—*Paterson v. Paterson*, 3 H. L. Cas. 308.

Where in a case of this sort the Court of Session had pronounced for a divorce, the Lords reversed the interlocutor.—*Id.*

Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted.—*Id.*

Quære, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce?—*Id.*

The general principle of the law as to divorce *a mensâ et thoro* is the same in *England* and *Scotland*.—*Id.*

But it seems that a special principle exists in the law of *Scotland*, which permits a divorce for a wilful desertion continued for four years.—*Id.*

8. A foreign court cannot dissolve the bonds of an *English* marriage, where the parties are not *bonâ fide* domiciled in the foreign country. *Quære*, even if they are?—*Dolphin v. Robins*, 7 H. L. Cas. 390.

The law is the same under the 9 *Geo.* 4, c. 31, s. 22, as it was under 1 *Jac.* 1, c. 11, s. 3.—*Id.*

A *Scotch* Court pronounced a decree of divorce in the case of an *English*

DIVORCE—continued.

marriage, where there was no real Scotch domicile :

Held, that this decree had no effect, either as a divorce *à vinculo*, or *à mensâ et thoro*.—*Dolphin v. Robins*, 7 H. L. Cas. 390.

Semble, that an agreement to live separate is not equivalent in its legal effects to a judicial sentence of separation.—*Id.*

Quære, whether, after a decree for judicial separation, a wife can acquire a domicile different from that of the husband?—*Id.*

A. and *B.* were married in *England* in 1822; they lived together till 1839, when they separated. In February 1854 the husband went to *Scotland*, and resided there, with some very short intervals, till July 1854. In June 1854, his wife, who had followed him to *Scotland*, sued out, in the Scotch courts, a process for dissolution of marriage, on account of adultery committed by him in *Scotland*. In July a decree for divorce *à vinculo* was pronounced. In September she married a *Frenchman* (according to the forms required by *Scotch* and by *French* law), and went with him to his domicile in *France*. While in *England* she had executed an *English* will, in pursuance of a power reserved to her, and in accordance with the terms of that power. After having resided nearly two years in *France*, she executed, in June 1856, a holograph will (valid according to the laws of that country) revoking all previous wills :

Held (sustaining the judgment of the Court of Probate), that there had not been any change of domicile by the husband *A.*; that the domicile of *B.*, the wife, was that of her husband; that the *Scotch* decree of divorce had no effect; that she continued to be a married woman, and a domiciled *English* woman; and that consequently, her will of 1854 was properly admitted to probate, and the revoking paper of June 1856 was a nullity.—*Id.*

9. The 29th section of the 20 & 21 *Vict.* c. 85, imposes on the Court of the Judge Ordinary the obligation to inquire into any countercharge

DIVORCE—continued.

made against any person petitioning for a divorce.—*Lautour v. The Queen's Advocate*, 10 H. L. Cas. 685.

Adultery alleged to have been committed by the petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *à mensâ et thoro*, and the actual time of the marriage, is a countercharge into which the Court is so bound to inquire.—*Id.*

If such adultery has been committed between the time when a decree for a divorce *à mensâ et thoro*, under the old law, was pronounced, and a time when a petition under the 20 & 21 *Vict.* c. 85, was presented, praying for a dissolution of the marriage, the Judge Ordinary, on being duly informed thereof, is "not bound" under the 31st section of the statute to dissolve the marriage.—*Id.*

Quære, whether he may, in his discretion, dissolve it?—*Id.*

The 23 & 24 *Vict.* c. 144, enables any one of the public to give to the Court of the Judge Ordinary, between the decree *nisi* and the decree absolute for a divorce, information to relieve it from being misled on the subject of a divorce petition. That section gives to the Queen's proctor the power to intervene in a case of collusion only, and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs.—*Id.*

10. The word "conniving" in the 29th section of the 20 & 21 *Vict.* c. 85, means not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect will occur.—*Gipps v. Gipps*, 11 H. L. Cas. 1.

So, if he takes money from the adulterer not to complain of the wrong, but to abandon his legal remedy for it, and then leaves the wife in a situation likely to occasion a renewal of the adulterous intercourse

DIVORCE—*continued.*

with the same person, he is "accessory" to it.—*Gipps v. Gipps*, 11 H. L. Cas. 1.

Therefore, where *A.* presented a petition for a divorce in respect of the wife's adultery with *B.*, and received from *B.* a sum of money not to include in the petition a prayer for damages, and afterwards, on receiving a promise from *B.* to execute a bond to pay a farther sum, offered no evidence in support of his petition, and allowed a verdict to be given for the respondent and co-respondent, and the petition to be dismissed, but made no provision for his wife, nor took any precaution to protect her against future intercourse with *B.* :

Held, that his conduct was such as to bring him within the words of the statute, so that his fresh petition in respect of renewed acts of adultery, occurring after the compromise, was properly dismissed. (*Diss. Lord Wensleydale.*)—*Id.*

Quere, whether the word "adultery" in the 31st section of the 20 & 21 *Vict.* c. 85, is confined to the adultery alleged in the petition for the dissolution of marriage?—*Per Lord Westbury* (Lord Chancellor): It is not; so that if *A.* has connived at the adultery of his wife with *B.*, he cannot obtain a divorce on account of her adultery with *C.*—*Id.*

A husband cannot obtain a divorce in respect of an act of adultery committed with a particular person at one time, if at a previous time he has connived at her adultery with the same person.—*Id.*

Per Lord Wensleydale and *Lord Chelmsford*: To constitute connivance there must be a corrupt intention. The first arrangement in this case did not amount to connivance, and did not bar the remedy of it in respect of a fresh act of adultery.—*Id.*

Per Lord Chelmsford: Renewed adultery with the same person is not a fresh act of adultery, but merely farther evidence of the adultery.—*Id.*

Per Lord Wensleydale: A covenant to pay damages to a petitioner for a divorce on the ground of adultery, is altogether void as contrary to the

DIVORCE—*continued.*

policy of the 20 & 21 *Vict.* c. 85, s. 33.—*Gipps v. Gipps*, 11 H. L. Cas. 1.

Per Lord Wensleydale: Where, by consent, a jury has been dispensed with on the trial of a petition for a divorce, if a new trial should be ordered, the consent previously given would no longer be binding, and the petitioner might demand to have his case tried before a jury.

(*Timmins v. Timmins*, 3 *Hagg. Eccl. Rep.* 76–81, observed upon).—*Id.*

DOMICILE. *See* MARRIAGE.

1. In matters to be determined by the domicile of the parties, it is a principle of law that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile.

In order to acquire a domicile there must be actual residence in the place chosen, which must be the principal and permanent residence of the party.

By marriage the domicile of the wife becomes that of the husband.—*Dalhousie v. McDowall*, 7 *Cl. & F.* 817; *Munro v. Munro*, *Id.* 842.

See 24 & 25 *Vict.* cc. 114, 121; *Whicker v. Hume*, 7 *H. L. Cas.* 131; *Moorhouse v. Lord*, 10 *H. L. Cas.* 279.

2. The law of a domicile of a deceased person governs the succession to his personal estate wherever situated; but the estate itself must be administered in the country in which possession is taken of it under lawful authority.—*Preston v. Melville*, 8 *Cl. & F.* 1.

See Carron Company v. MacLaren, 5 *H. L. Cas.* 416; *Enohin v. Wylie*, 10 *H. L. Cas.* 1.

3. The domicile which an owner of personal property has at the time of his death, determines whether it is or not liable to legacy duty.—*Thomson v. The Advocate General*, 12 *Cl. & F.* 1.

4. A company may have two domiciles, and places of business may, for the purpose of founding jurisdiction, be

DOMICILE—continued.

treated as places of domicile, and service there is sufficient.—*Carron Company v. Maclaren*, 5 H. L. Cas. 416.

Quære, whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale of the goods of the principal?—*Id.*

5. *A.* was born in *Scotland*: when a young man he went to the *East Indies*, where he remained above 20 years in the Company's service. He then returned to *Scotland*, and lived in *Edinburgh*, where he put his name on the books of the municipality, married, took a house, entered into business as partner in a bank, and became a member of various societies there established. At the end of a few years he left *Edinburgh* in anger, the banking business had come to an end, and he took his name off the books of the municipality and of the various societies, and declared his intention "never to return to 'Auld Reekie'." He lived in *London*, first in lodgings, and then in houses hired for different periods, lectured on oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the *Hindustanee* language. At the end of some years he went to *Paris* to avoid some annoyances in *London*, but never made any such declaration with respect to *London* as he had made with respect to *Edinburgh*, and he left his works in *London*, and likewise some ornamental furniture, which he desired a friend to keep for him till his "return." He died in *Paris*, having just before made a will in the *English* form:

Held, that he had lost his *Scotch* and obtained an *English* domicile. — *Whicker v. Hume*, 7 H. L. Cas. 124.

6. *Quære*, whether after a decree for judicial separation a wife can acquire a domicile different from that of her husband?—*Dolphin v. Robins*, 7 H. L. Cas. 390.

See *Geils v. Geils*, 3 H. L. Cas. 280; *post*, PLEADING, 39.

7. The law of the domicile of a testator governs questions of testacy and intestacy, of the construction of the

DOMICILE—continued.

will, and of the rights of those who claim to be his next of kin.—*Enokin v. Wylie*, 10 H. L. Cas. 1.

Where, therefore, a will was made by an Englishman, who died domiciled abroad, and the foreign court had granted probate of the will, it became the duty of the *English* Court of Probate (some of his personal property being situated in this country) to grant ancillary probate to the foreign executors. It had no right to constitute itself a court of construction.—*Id.*

The Court of Chancery, in like manner, was not entitled to entertain an administration suit founded on a question relating to the construction of the will, and the foreign executors might properly have excepted to its jurisdiction. But parties thus entitled to insist on the authority of the court of the domicile, may, by their conduct, give to the *English* Court authority and jurisdiction to construe the will and administer the estate, so far as funds and persons in this country are concerned.

A., a *British* subject, domiciled in *St. Petersburg*, made a will in the *Russian* form and *Russian* language, by which he expressed a desire "to dispose of all my moveable and immoveable property." After giving legacies, and directing his household property and estates in *Russia* to be sold, he went on, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets" [a bank debenture peculiar to *Russia*] "belonging to me, shall be divided into 10 equal parts:" two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed disposal;" but if he did not (and he never did) they were to go to charitable purposes. He then named executors, and concluded thus: "And as all my moveable and immoveable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions and contest the same, and no one has a right to interfere with, or control the dispositions and proceedings of, my

DOMICILE—continued.

executors." The testator had large funds in the *English* consols :

Held, that the executors did not take these consols under the general bequest in the will ; and held also, that as to these consols, there was an intestacy.—*Enohin v. Wylie*, 10 H. L. Cas. 1.

8. In order to lose a domicile of origin, and to acquire a new domicile, a man must intend *quatenus in illo exere patriam*. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. Change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. There must be an intention to change the domicile.—*Moorhouse v. Lord*, 10 H. L. Cas. 272.

DOMINANT AND SERVIENT TENEMENT. See PLEADING, 1.**DONATIO MORTIS CAUSA.**

A father, in contemplation of speedily approaching death, wishing to make a larger provision for a daughter than he had done by his will, delivers, or causes to be delivered to her, a bond and a mortgage security for a certain sum of money, and a mortgage security for another sum of money. This is a good *donatio mortis causa*, and the heir or executor is bound to give effect to the intent of the donor. *Per Eldon* (Earl of), "This is the first absolute decision on the question."—*Duffield v. Hicks*, 1 Dow & C. 1.

DOUBLE PROOF. See BANKRUPTCY.**DOWER.** See 3 & 4 WILL. 4, c. 105.

On the marriage of A., a certain sum was settled in trust for her for life, "as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal, or freehold," of her intended husband :

Held, affirming the decree of the

DOWER—continued.

Court of Chancery of *Ireland*, that this settlement barred her claim on the personal estate of her intestate husband, under the Statute of Distributions.—*Gurly v. Gurly*, 8 Cl. & F. 743.

DROITS OF THE CROWN. See INTESTATES' ESTATES.

The personal estate of an intestate who leaves no next of kin, belongs absolutely to the Crown, as part of the droits of the Crown. The fact that these droits are now by statute paid into the Treasury, and made to form part of the public revenue, makes no difference in this matter.—*The Attorney General v. Köhler*, 9 H. L. Cas. 654.

DUBLIN, TREASURER OF. See CORPORATION.

An information in the nature of a *quo warranto* will lie for this office.—*Darley v. The Queen*, 12 Cl. & F. 520.

DUTIES. See CONTRACT. CUSTOMS. DAMAGES.**EASEMENT.** See LIGHTS. WATER. PLEADING.**ECCLESIASTICAL COURT.** See CHURCH RATE.

The Spiritual Court, notwithstanding the statute 27 Geo. 3, c. 44, may take cognizance of charges of fornication or incontinence made against clergymen, even after the expiration of the eight months from the time of commission, with a view to suspension or defamation or other punishment merely clerical.—*Free v. Burgoyne*, 1 Dow & C. 115.

EDINBURGH. See CORPORATION.**ELECTION.** See MARRIAGE SETTLEMENT. WILL.

1. A woman entitled absolutely to certain leasehold premises marries, and by the marriage settlement becomes entitled absolutely to the same premises, in case she survives the husband. He, by his will, disposes of

ELECTION—continued.

the premises as if they had been his own, and gives them to his wife for life, and then to her first and second daughters for life in succession. The wife takes some advantages under the will of the husband, in addition to the leasehold premises, but is entirely ignorant of any necessity to elect, and makes no election in fact. The wife makes a will, by which the leasehold premises are left to her eldest daughter absolutely, according to her power under the marriage settlement, but in contravention of the husband's will, by which the eldest daughter had only an estate for life. On the death of the eldest daughter, the second daughter claims the property, and is let into possession by the representative of the eldest daughter, in ignorance of his own right. Some years afterwards the representative of the eldest daughter filed his bill in the Exchequer for restitution to him of the premises in question, on the ground that the wife had a right to dispose of the premises absolutely, and that she was not bound to elect, and never thought of electing, under the will of her husband:

Held, by the House of Lords, affirming the judgment of the Court of Exchequer, that the claim of the representative of the eldest daughter was good, and that this was not a case for election.—*Morgan v. Edwards*, 1 Dow & C. 104.

See *Spread v. Morgan*, 11 H. L. Cas. 588.

2. *P. R.* having a lease (1736) for lives renewable, settles (1743) the lands comprised in it, on the marriage of his son *T. R.*, to the use of himself for life, remainder to *T. R.* for life, remainder to the sons of the marriage in tail male, reversion to himself in fee. Issue of the marriage, *P. R.* the younger. *P. R.* the elder (1749) purchases the fee of the lands in the lease, and by will (1766) devises the inheritance to *T. R.* for life, remainder to *P. R.* the younger for life, remainder to his sons successively in tail male; and after some other remainders, remainder to *D.* and *W. R.* (appellants), the one for life, the other in tail, reversion to

ELECTION—continued.

his own right heirs. And *T. R.* was empowered, in case *P. R.* the younger refused to settle his interest in the lease to the same uses as testator had limited the inheritance, at his discretion to deprive *P. R.* the younger of his life estate, under the will; but this power was not executed. Testator dies in 1769; settlement (1770) on marriage of *P. R.* the younger, whereby the lease is conveyed to trustees, in trust for *T. R.* for life, remainder to *P. R.* for life, remainder to the issue of the marriage in tail, reversion to *T. R.* absolutely. *P. R.* (1799) dies without ever having had issue, and *T. R.* conveys the reversion of the lease to *R. R.* (respondent), his natural son, and dies in 1805. In 1811 *D. R.* and *W. R.* become entitled in possession to the inheritance of the lands comprised in the lease, as the last remainder men under the will of *P. R.* the elder, and they refuse to renew the lease to *R. R.*, on the ground that it was merged in the fee when that was purchased by *P. R.* the elder; or that *P. R.* the younger had elected to take under the will, and allowed his interest in the lease to go with the inheritance; and that the settlement on the marriage of *P. R.* the younger, under which *T. R.* took the reversion of the lease, was a fraud on the will. But the Court below decreed a renewal, and the decree affirmed by the Lords.—*Rutledge v. Rutledge*, 1 Dow & C. 331.

3. *A.*, domiciled in *Scotland*, and possessed of real estate in *England* and of heritable and moveable property in *Scotland*, left (in 1824) by a trust disposition (will) executed in the *Scotch* form and attested only by two witnesses, the whole of his subject, heritable and moveable, to trustees, directing them to turn the whole into money, and to divide the proceeds equally among his four children. The heir claimed the *English* estate as undisposed of, the *Scotch* will attested only by two witnesses not being competent to pass real estate in *England*, and he also claimed, under this *Scotch* will, his fourth share of the *Scotch* property:

ELECTION—continued.

Held (affirming a unanimous decision of the Second Division of the Court of Session), that the heir-at-law was put to his approbate and reprobate (election), and must allow the trust disposition to have effect over all the property or claim as heir alone, and take nothing under the trust disposition.—*Dundas v. Dundas*, 2 Dow & C. 349.

4. The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation.—*Spread v. Morgan*, 11 H. L. Cas. 588.

Where a case of election arises, the person who ought to make it must be shown to have known of his duty to do so, and must be proved to have done such acts as amounted to an election.—*Id.*

Remaining in possession of two estates, held under titles not consistent with each other, affords no decisive proof of that kind. The rule is, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one, and reject the other." (*Padbury v. Clark*, 2 Macn. & Gord. 298, confirmed).—*Id.*

Semble, per Lord Chelmsford: A party having an equity to compel an election, does not forfeit that equity by delay in enforcing it.

Per Lord Chelmsford: An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made.—*Id.*

EMBARGO. See INSURANCE.

A. was a seaman in a *British* ship lying at *St. Petersburg*, when, in consequence of differences between the *English* and *Russian* Governments, the latter Government issued an order to detain all *British* ships till these differences should be settled.

EMBARGO—continued.

The crews were taken out of the ships and marched up the country, where they were detained by the *Russian* Government. At the end of six months they were marched back, and the ships restored:

Held, that this was an embargo, and not a hostile capture, and that consequently the seamen's wages were payable during the time it continued.—*Thomson v. Beale*, 1 Dow, 299.

See *Klecunwort v. Shepard*, 1 EL. & EL. 452.

ENROLMENT. See APPEALS, 1, 12. PRACTICE.

1. The House, if the objection is taken, will not hear an appeal against any order or decree of the Court of Chancery that is not enrolled. And if the appeal be against a State order or decree, time to enrol it will not be granted unless the merits appear to be with the appellant.—*Broadhurst v. Turnicliiff*, 9 CL. & F. 71.
2. The General Orders of the Court of Chancery of the 7th August 1852, limiting the time for enrolment (except by leave of the Court) to five years, are valid.—*Bevan v. Mornington (Countess)*, 8 H. L. Cas. 525.

ENTAIL. See ALIENATION. HEIR-AT-LAW. LEGITIM. POWER. WILL.

1. A testator devised (in 1688) lands in *Scotland* in a succession of estates tail, with a prohibition against "letting tacks in diminution of the true worth, and rental may be paid for the said tacks." One of the tenants in tail made a lease for 1000 years, at a rent below that which was paid at the time of the expiration of the preceding lease:

Held, that this was an alienation in violation of the prohibition, and that the lease was invalid.—*Turner v. Turner*, 1 Dow, 423.

2. A lease for 99 years falls under the prohibition against alienation in a strict entail.—*Henderson v. Malcolm*, 2 Dow, 285.
3. Entail with restrictions on the heirs and members of tailzie:

Held, by the Lords, affirming a decree of the Court of Session, that the institute (the person to whom the

ENTAIL—*continued.*

estate is first given) was not included in the word *members*.—*Steel v. Steel*, 5 Dow, 72.

4. Whether a 57 years' lease is struck at by the prohibition to alienate in an entail? Whether the taking of *grassum* (a premium or fine) is struck at by the prohibition to alienate, and the proviso against diminution of the rental? Whether there may be a fraud on an entail, distinct from what is prohibited? Whether a lease for 31 years; or in case that should not be good, for the longest of certain alternate periods, from 21 to 19 years, for which the grantor should be found by the Court of Session or House of Lords, to have power to make a lease, may be a good lease for the restricted periods of 21 or 19 years, notwithstanding the indefinite *ish*, &c. &c.—*Montgomery v. Wemyss (Earl)*, 5 Dow, 293.

[The case was remitted to the Court of Session.]

See *ante*, S. C., 2 Dow 90 (ALIENATION), where a lease for 97 years had been held invalid.

EQUITY. See CONTRACT, 24. EXCHANGE OF LANDS. PLEADING. PRACTICE.

1. In equity there is a marked distinction between what is necessary to resist a suit for specific performance of a contract, and a suit founded on a contract executed.—*Vigers v. Pike*, 8 Cl. & F. 645.
2. Any equities between grantors of an annuity are not to affect the grantees, unless they have distinct notice of them at the time of the grant.—*Hollier v. Eyre*, 9 Cl. & F. 1.
See *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Owen v. Homan*, 4 H. L. Cas. 997; *Mounsell v. White*, Id. 1039.
3. A representation made by one party, for the purpose of influencing the conduct of another, and acted on by the latter, will in general be sufficient to entitle him to the assistance of a Court of Equity, for the purpose of realising such representations.—*Hammersley v. De Biel*, 12 Cl. & F. 45.

EQUITY—*continued.*

4. The 6 & 7 Will. 4, c. 115 (extended by the 3 & 4 Vict. c. 31), authorises exchanges of lands on conditions therein prescribed. One of these is the written consent of the owner of the lands intended to be exchanged. The landowners of a parish determined to carry this Act into execution, and appointed a commissioner for that purpose. *B.*, one of the landowners, authorised his agent to attend for him at the meetings held for the purpose of carrying the Act into execution, but desired him not to exchange a particular wood except for woodland. *N.*'s lands were to be exchanged against those of *B.*, and this restriction was communicated to *N.*'s agent, who was asked to exchange another wood against the wood in question, but who said that his principal had no power to do so. This answer was communicated to *B.*, who took no farther notice of the matter. The restriction on the authority of *B.*'s agent did not appear to have been brought to the knowledge of the commissioner. *B.* signed, and sent to the commissioner, a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question, but the number by which it was referred to in the consent and in a map and plan previously submitted to *B.*'s inspection, was not the same as that which it bore in *B.*'s private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioner's map, would have shown *B.* that the wood in question was included in his consent. The commissioner allotted the lands to be exchanged, and among others, included this wood, but did not give woodland for it. Possession of the exchanged lands, and of this wood among the rest (although the award of the commissioner had not been formally executed), was delivered by *B.*'s agent to *N.*, who immediately began to exercise acts of ownership over it. *B.*, some time afterwards, discovered what had been done, and brought ejectment against *N.* for the wood. *N.* filed his bill in Chan-

EQUITY—continued.

cery to restrain *B.* from proceeding with the action, and to compel him to perfect the exchange; and *B.* filed his bill to prevent the Commissioner from executing the award, alleging that the consent given to him had been signed in mistake:

Held, that *N.* was entitled to an injunction as prayed by the bill, and that *B.* had no equity on which to ask for the interference of the Court in his favour.—*Beaufort (Duke) v. Neeld*, 12 Cl. & F. 248.

The statute 6 & 7 Will. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions, an appeal to the Quarter Sessions.—*Id.*

Seem, that this would not deprive a party aggrieved of his right to apply for the interference of a Court of Equity if he was in other respects entitled to that interference.—*Id.*

See *Squire v. Whitton*, 1 H. L. Cas. 333; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Darnley v. London, Chatham, and Dover Railway*, L. R., 2 H. L., 43.

5. *K.* holding lands under the see of *D.*, for a renewable term of 21 years, demised them, in 1787, to two persons for a like term, with a *toties quoties* covenant for a renewal. These persons sold their interest in part of the lands, and divided the rest equally between themselves. On the death of one, his share passed to his two sons, *A.* and *A. Lowry*; the share of the other was sold to *P.* The two *Lowry*'s obtained a renewal of the leases of all the lands to themselves in 1822, without *P.*'s knowledge, and then mortgaged them to *M.*, and obtained a judgment in ejectment against *P.*, who thereupon filed a bill against them and *M.*, and obtained, in 1826, a decree for an account and re-conveyance of his part, on payment of his proportion of the renewal fines and costs. *W.*, who had been the attorney of the *Lowry*'s in all these matters, obtained an assignment of their interest in 1829. *P.* did not make up the decree of 1826, but made several payments to *W.* in respect of the renewal fines and costs, and urged him to reconvey to

EQUITY—continued.

him his part of the lands, and grant a renewal; but being in distress, he signed an agreement to surrender his lands to *W.*, and take part of them as his tenant:

Held, upon a bill filed by *P.*, in 1842, that he was entitled to the benefits of the decree of 1826 against *W.*; that the accounts thereby directed ought to be then taken; that the agreement signed by *P.* to surrender was without consideration, and void; and that he was entitled to the value of his lands while they were in the possession of *W.*, and to a re-conveyance and renewal, upon payment of the balance found due from him.—*Wallace v. Patton*, 12 Cl. & F. 491.

6. Although a case against a railway company upon a contract, may consist of matters cognisable at law, yet if there are complicated accounts between the company and other parties respectively, a Court of Equity is more competent than a Court of Law to take them, and to dispose of the whole case. Therefore, when *N.* and *S.* had become contractors with a railway, and *S.* had become bankrupt, and the company refused to account with *N.* for the balance due, it was held that *N.* might file a bill against the company and *S.*'s assignees for an account.—*Taff Vale Railway Company v. Nixon*, 1 H. L. Cas. 111.

See *Foley v. Hill*, 2 H. L. Cas. 28.

7. In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant, and to finish the work; the company acted on this clause:

Held, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages.—*Ranger v. The Great Western Railway Company*, 5 H. L. Cas. 72.

8. Where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, because, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it, nor will equity interfere even though

EQUITY—continued.

the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable engagements. To raise such an equity, there must be misrepresentation of facts and not of mere intention. (Lord *St. Leonards* dissentiente.)—*Jorden v. Money*, 5 H. L. Cas. 185.

Per Lord St. Leonards: It is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do, or abstain from doing, an act which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, on the faith of that representation.—*Id.*

See *Caton v. Caton*, L. R., 2 H. L., 127.

9. Where one person entrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due, equity will compel their transfer.—*Stanton v. Percival*, 5 H. L. Cas. 257.

A creditor of a company had sued the company and obtained judgment, and then, at the desire of the directors, had issued a *sci. fa.* against *S.*; *S.* obtained an injunction to prevent the creditor from enforcing the judgment as against *S.*—*Id.*

Per Lord St. Leonards: Where a company has, under the Act 7 Geo. 4, c. 46, made use of a creditor, to proceed against a person, as a shareholder, when that person ought not properly to be placed in that position, he is entitled to relief.—*Id.*

10. If directors of a company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect to do acts which are within their authority, and which they ought to perform, neither a Court of Law or of Equity will allow them afterwards to take advantage of their own neglect.—*Bargate v. Shortridge*, 5 H. L. Cas. 297.
11. Where *A.* and *B.* join in a transaction effected with them by *C.*, which is invalid as to *B.*, he is not precluded from afterwards objecting to it merely because it is binding on *A.*—*Savery v. King*, 5 H. L. Cas. 627.
12. A Court of Equity does not restrict the protection it will afford a pur-

EQUITY—continued.

chaser for valuable consideration without notice, to a case in which he has got the legal estate.—*Colyer v. Finch*, 5 H. L. Cas. 905.

13. Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance.—*Shrewsbury, &c. Railway Company v. North Western Railway*, 6 H. L. Cas. 113.
14. Long delay may prevent a party to an agreement from calling for a specific performance of it.—*Ridgway v. Wharton*, 6 H. L. Cas. 238.
15. Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law.—*Midland Great Western Railway (Ir.) v. Johnson*, 6 H. L. Cas. 798.

Mutual mistake as to its construction will not entitle either party to relief in equity.—*Id.*

Where the law has declared the construction of a contract, a Court of Equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealing under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised, and in due form.—*Id.*

If such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal.—*Id.*

A. entered into a contract, under seal, with an incorporated railway company to do the haulage work of the company, and to keep in repair its rolling stock. He was likewise to make new rolling stock, and out of the payments which should become due to him, a depreciation fund of five per cent. on the value of the stock, as ascertained at the end of each year, was to be formed; "and if the stock has diminished in value more than the allowed depreciation of five per cent., the contractor to pay the difference to the company; if it has increased in value, the com-

EQUITY—continued.

panty to pay the difference to the contractor." At law, it was held that the fund thus formed belonged to the company. The contractor did not impeach this decision at law, but filed a cause petition in equity, claiming to have this fund allotted to him, on the ground that while the contract continued in operation, the dealings between himself and the company's chief engineer, whose decision "on all and everything connected with the working of the contract, and the sums to be paid or deducted," was to be binding, without appeal, on both parties, had made monthly and annual calculations, in which the fund was treated as a mere guarantie fund, and had thereby induced him to go to larger expense than he should otherwise have incurred, in order to improve the rolling stock of the company :

Held, that these circumstances did not establish any ground for equitable relief.—*Midland Great Western Railway (Ir.) v. Johnson*, 6 H. L. Cas. 798.

16. *N.*, a timber merchant in *Sweden*, had dealings with *D.*, a merchant in *London*, and sent him cargoes of timber, which *D.* disposed of on a *del credere* commission, and in respect of which *N.* drew bills on *D.* In September 1853 the accounts between them were unsettled, but *D.* claimed a considerable balance as due to himself. On the 29th September, *N.* wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on *D.* On the 24th October *H. & Co.*, merchants in *London*, received through *K.*, their agent, and the manager of their business in *Sweden*, a letter from *N.*, in which he enclosed a letter to *D.*, whereby he drew on *D.* for 1312*l.*, which he claimed as due to himself from *D.*; and in the letter to *H. & Co.*, he desired that this enclosure might be handed to *D.*; and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that *N.* had duly delivered all the cargoes of timber contracted for between them, except one, particularly named, that then *H. & Co.* were to hand to *D.* the three bills of lading of three

EQUITY—continued.

ships, also named; but if he would not accept the draft, nor give the acknowledgment, then *H. & Co.* were to insure the cargoes, and sell them; and *N.* drew on *H. & Co.* drafts to the amount of 1300*l.* This letter was read to *D.*, who hesitated to accept the draft for 1312*l.*, declaring that he was largely in advance to *N.* It was left in his bill-box for acceptance on the morning of the 24th October, and a formal letter, demanding compliance with the conditions of *N.*, was written to him by *H. & Co.* In the course of the same day *D.* wrote to *H. & Co.* requesting the loan of the bills of lading, saying, "We will return them to you, if from any cause we do not accept the bill for 1312*l.*" They were sent to him. In the same day, but after *D.*'s request had been complied with, *H. & Co.* accepted the first of *N.*'s drafts, and wrote to say they would "give protection" to all. On the morning of the 25th October a clerk of *H. & Co.* learned at *D.*'s counting-house that the draft for 1312*l.* had not been accepted; but in the middle of that day it was sent to *H. & Co.* accepted. *D.*, however, refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for 1312*l.*), attached the goods in the hands of *H. & Co.* They brought an action against him to recover the bills of lading, and he filed a bill to stay the action :

Held, that he had not such equitable right on account of anything occurring before the 24th October as would prevail against the legal rights which *H. & Co.* acquired on that day.—*Hoare v. Dresser*, 7 H. L. Cas. 290.

See *Woodley v. Coventry*, 2 Hurl. & C. 174, n., and *Turley v. Bates*, Id. 200.

17. Though a right to an action at law and a right to sue in equity spring from the same transaction, and though the personal representative of the person having these rights may, by special circumstances, be prevented from maintaining an action at law, his right to sue in equity will not thereby be lost.—*Midland Railway Company v. Taylor*, 8 H. L. Cas. 751.

EQUITY—continued.

T. and *B.* were partners. Stock was standing in the books of a railway company in their joint names. *B.* sold out the stock by a deed which he executed, and to which he forged the name of *T.*, but he continued to account to *T.* for the dividends, and *T.* died in ignorance of the forgery. *T.*'s personal representative afterwards filed a bill against the company for a retransfer of the stock :

Held, that though by the death of *T.* the right to an action at law was gone, the right to a suit in equity still remained, and a decree directing the company to retransfer the stock was sustained.—*The Midland Railway Company v. Taylor*, 8 H. L. Cas. 751.

ERROR. See EVIDENCE. EXCEPTIONS, BILL OF. PLEADING. PRACTICE.

1. *Quere*, whether a judgment given by the Court of Queen's Bench in Ireland, on a bill of exceptions tendered to the charge of a judge of that Court, in an action brought and tried in that Court, is not in itself irregular and erroneous?—*Galwey v. Baker*, 7 Cl. & F. 379.
2. A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—*King v. Simmonds*, 1 H. L. Cas. 754.

If a writ of error does not lie in a particular case, the Court of Error may properly, upon a rule obtained for that purpose, order the writ to be quashed.—*Id.*

A writ of error, alleged error in the judgment in "an action on promises." The transcript of the record showed that the judgment was given, not in an action on promises, but on a feigned issue :

Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.—*Id.*

3. Where it appeared to the House that a mistake committed by an officer of the Court below in entering the judgment of that Court was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over to allow the parties to apply to the Court below to amend

ERROR—continued.

the error. The House made this order, after referring to the opinions of the judges of the Court below, as stated in the printed reports of the decisions of that Court.—*Gregory v. The Duke of Brunswick*, 2 H. L. Cas. 415.

4. On a trial in Dublin between *A.* and *B.*, the verdict was given for *B.* On exceptions presented by *A.*, a *venire de novo* was ordered, and a new trial took place. *B.* did not appear, and a verdict was given for *A.*, and he recovered judgment. *B.* brought a writ of error, and it was then discovered that the *postea* and all the proceedings relating to the first trial had been struck out of the record, which, from the first *venire*, went on with formal continuances only to the second trial and verdict. The Court on application refused to supply these omissions :

Held, that this was erroneous, and the Court was ordered to amend the record by entering on the plea roll the first trial, the exceptions, and the award of the *venire de novo*.—*Governor, &c. of the Bank of Ireland v. The Trustees of Evans Charities*, 5 H. L. Cas. 389.

5. The Court in which an action was brought gave a final judgment ; a Court of Error reversed or varied that judgment, though the form in which this was done in the Court of Error was not that of a final judgment :

Held, that error would lie to this House.—*M'Mahon v. Leonard*, 5 H. L. Cas. 931.

ESCAPE.

The magistrates of a Scotch burgh, under the Act of Sederunt of 1672, having, on proper formal certificate and evidence, released a prisoner for debt from actual confinement in prison, and allowed him to reside in a house within the burgh upon his giving bond, with sureties, to do so, are not liable to the creditor for the amount of the debt, although the debtor does not reside in the specified house, and does not conform to the stipulations in the bond.—*Ritchie v. The Magistrates of Canongate*, 5 Dow, 87.

See *Hooper v. Lane*, 6 H. L. Cas. 443.

ESTATE, VESTING OF. See **HEIR-AT-LAW. WILL.**

A testator gave all his real and personal estates to trustees; and as to his lands at *W.*, which he held in fee simple, he directed that the trustees should stand seised thereof, in trust to convey the same to *G. H. A.* "when and as soon as he should attain his age of 21 years;" but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at *W.* given and devised to him, should sink into the residue of the testator's real and personal estates; and he gave the residue to *J. C.* At the testator's death *G. H. A.* was only 12 years of age:

Held, that an equitable estate in fee in the lands at *W.* vested in *G. H. A.* immediately on the testator's death, liable to be divested in the event of his dying under 21 without leaving issue of his body.—*Phipps v. Ackers*, 9 Cl. & F. 583.

See *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Randfield v. Randfield*, 8 H. L. Cas. 225.

ETTRICK FOREST.

The office of Chamberlain and Collector of Revenues to the Crown out of *Ettrick Forest*, was granted by *Geo. IV.* to Lord *D.* for his life, with a yearly salary, "as well in consideration of the office as out of Royal Bounty and favour," to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues for several years after the demise of *Geo. IV.*:

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension to endure beyond the life of the royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord Dunlop*, 9 Cl. & F. 173.

See *The Corporation of London v. The Attorney General*, 1 H. L. Cas. 440; *Smith v. Officers of State for Scotland*, 2 H. L. Cas. 807; *The Attorney General v. Dean, &c. of Windsor*, 8 H. L. Cas. 369.

EVIDENCE. See **BOUNDARIES**, 12. **CRESSIO BONORUM. EXCEPTIONS, BILL OF**, 2. **MERCHANT'S BOOK. RES JUDICATA. SPECIFIC PERFORMANCE**, 1.

1. A decree arbitral (an award) cannot be set aside on account of evidence discovered after it is made, and which might, but for the negligence of the applicant himself, have been produced before the decree arbitral, was made.—*Sharp v. Bury*, 1 Dow, 223.

2. Upon an *ex-officio* information for penalties under the 48 *Geo. 3*, c. 56, s. 11, for carrying more passengers in a vessel than were allowed by law, copies of entries proved by the controller of the port before whom the master had appeared, and who had himself made the original entries, were held admissible in evidence in support of the information.—*Tomkins v. The Attorney General*, 1 Dow, 404.

3. In a proceeding for penalties under the statute 16 *Geo. 2*, c. 11 (*Sc.*), the town books with the names of the persons entitled to vote, are the best evidence to show who were the persons so entitled.—*Black v. Campbell*, 5 Dow, 23.

4. A paper which might, with due diligence, be found at first, is not, in legal meaning, *noviter repertum*.—*Dixon v. Graham*, 5 Dow, 266.

5. In an action to recover the costs of conducting an appeal to the House of Lords against a judgment of the Court of Session, in a suit for the amount insured upon salvage on recapture, a question arose as to who were the owners of the vessel recaptured. *Y., O., and S.* were alleged to be the owners. It appeared that *S.* was only registered as owner in virtue of security for a debt owing to him by *O.* Pending the original suit the ship was sold, and the debt paid to *S.* It appeared that *S.*'s name was on one register but not on another, where the name of *Y.* appeared, and that both names were not found together on any register:

Held, therefore, that the statement made by *Y.* was not operative as that of a part owner binding on his other partners, and the judgment of the Court below in favour of the respondent was affirmed.—*Campbell v. Stein*, 6 Dow, 116.

EVIDENCE—continued.

6. Marriage articles lost. Evidence that the house of the person in whose custody they ought to be, had been ransacked in 1798, by French troops and rebels, and many papers destroyed. Diligent search afterwards for the articles, which were not to be found: this is a fair presumption that they were destroyed, and secondary evidence of their existence and tenor admitted.—*Lord Lorton v. Gore*, 1 Dow & C. 191.
7. Evidence of facts and circumstances is admissible to remove the presumption of consent in a case where a regular marriage is alleged, but it appears that there was no proclamation of banns, such marriage not being considered a regular marriage, though said to be celebrated by a clergyman.—*Macniel v. Macgregor*, 1 Dow & C. 208.
8. Copies of wills are not evidence to support a claim of peerage; the originals must be produced.—*Netterville Peerage*, 2 Dow & C. 342.
See *post*, Nos. 35. 39. 61.
9. A witness cannot be rejected unless he has a direct and immediate interest in the result of the case in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit.
The rules of law in England and Scotland are the same on this subject.—*Ralston v. Rowat*, 1 Cl. & F. 424.
See *The Sussex Peerage Case*, 11 Cl. & F. 85; *Willow v. Farrell*, 1 H. L. Cas. 93.
[See 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99, abolishing the law which made a person who had an interest inadmissible as a witness.]
10. The manner in which the donor of a charity fund, who was the first trustee under his own grant, by which a school was instituted, conducted himself in the distribution of that fund, is strong evidence of intention, and may be so treated by the Court in construing the grant itself.—*The Attorney General v. Brasenose College*, 2 Cl. & F. 295.
11. B., a partner and acting director of a joint-stock company, procured for S., who was not a partner, at his re-

EVIDENCE—continued.

- quest, some shares in the company's stock, and received from him the purchase money. S. afterwards refused to accept the transfer of the shares, and to pay the instalments that accrued due on them, alleging, as the grounds of his refusal, that he was induced to purchase the shares by B.'s false and fraudulent representations, and fraudulent concealment as to the credit and solvency of the company. Upon the trial of an issue directed to ascertain the truth or falsehood of these allegations, several partners in the company were admitted as witnesses for B.: and the Court of Session, upon a bill of exceptions, held that they were competent witnesses.
- The House of Lords affirmed that decision.—*Syme v. Brown*, 3 Cl. & F. 412.
12. The Committee for Privileges, in claims to vote at the election of representative peers for Ireland, may admit an entry in the journals as evidence of limitations in a patent of peerage, without requiring the production of the patent.—*Dufferin and Claneboye Peerage*, 4 Cl. & F. 568.
 13. In *quare impedit* to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the Bishop of M., a case purporting to be a case stated for the opinion of counsel on the part of A., a former Bishop of M., touching the right of presentation to that church, and found in the family mansion of A.'s descendants, was tendered in evidence.
Held, admissible as against his successor in the same see.
Held also, that a deed relating to the same church, and brought from the same custody, was admissible in evidence against the same party.—*The Bishop of Meath v. Marquis of Winchester*, 4 Cl. & F. 445.
 14. A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of W., who had been shown to be a joint tenant with the plaintiff for a term of years in an advowson, alleged "whereupon and whereby the plaintiff became and still is possessed of the advowson as of an advowson in gross for the remainder of the said

EVIDENCE—continued.

term so therefore granted." The defendant pleaded that he, as Bishop of *M.*, was seised of the advowson in gross in right of his see, without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged :

Held, that a fine of the advowson in question levied in 1 *Jac.* 2, by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue.

Held, that if admitted, it ought not to be left to the jury to say whether it barred the action of *quære impedit*.—*Bishop of Meath v. Marquis of Winchester*, 4 Cl. & F. 445.

See *The Shrewsbury Peerage*, 7 H. L. Cas. 1 ; *Carlisle v. Whaley*, L. R., 2 H. L., 392.

15. In a claim of peerage, where there is no patent, or creation or enrolment of such patent, and the contemporaneous Lords' Journals are not in existence, an old MS. book purporting to be copied from the Journals by an officer whose duty it was to prepare lists of peers present and absent, will be received as evidence of a peer sitting in Parliament.—*The Slane Peerage*, 5 Cl. & F. 24.

A return to a Royal Commission, not signed nor sealed by the commissioners, is not admissible to prove any matter therein stated.—*Id.*

A pedigree made by a person with a view to a suit respecting property, is not receivable in a claim of peerage by his son to prove his descent ; nor is a case stated for the opinion of counsel produced from the family papers of a distant relation of the claimant.—*Id.*

Entries in a family missal are admitted as evidence of births, deaths, and marriages of members of the family, just like similar entries in a family Bible.—*Id.*

To make a copy of a record admissible in evidence, it is not enough that it was held by a witness while another read the original to him. There must be a change of hands, or the witness must himself read the copy with the original.—*Id.*

16. The statements of chroniclers or contemporary historians, are not admis-

EVIDENCE—continued.

sible as evidence of the creation of a peerage.—*The Vaux Peerage*, 5 Cl. & F. 526.

The admission of an inscription in a churchyard by a former Committee of Privileges, does not make a copy from their minutes necessarily admissible in another case. A paper writing found among an ancestor's papers, in the custody of a stranger in blood, and not signed by the ancestor, nor by any of his family, is not admissible to show the state of the family.—*Id.*

A manuscript book, entitled "Funeral Certificates of the Nobility," produced from the Herald's College, is admissible evidence of the state of the deceased's family, and other statements contained in it.

A monumental inscription admitted in one case is not as of course admissible in another.—*The Vaux Peerage*, 5 Cl. & F. 541.

See *The Braye Case*, 6 Cl. & F. 757 ; *The Donoughmore Case*, 3 H. L. Cas. 822.

17. On the question of the competency of a party to make a will, letters written to that party by third persons since deceased, and found (many years after their date) among his papers, are not admissible in evidence without proof that he himself acted upon them.—*Wright v. Tatham*, 5 Cl. & F. 670.

See *Macgregor v. Topham*, 3 H. L. Cas. 132 ; *Boyse v. Ropborough*, 6 H. L. Cas. 1.

18. Evidence cannot be received of admissions by a party if they are not put directly in issue by the pleadings, so that he may have an opportunity of contradicting them.—*Austin v. Chambers*, 6 Cl. & F. 1.

19. The rule which requires marriages, births, and deaths in *England*, to be proved by the registers, where there are no living witnesses, is not applicable to *Ireland*, where such registers have not been duly kept. Copies of instruments in writing there, and evidence of reputation, are admissible, after proof that search was made for registers.—*Earl of Roscommon's Claim*, 6 Cl. & F. 97.

EVIDENCE—continued.

20. An adjudication of the Irish House of Lords, is binding upon this House in the matter of an Irish peerage.—*The Earl of Waterford's Claim*, 6 Cl. & F. 133.

21. Where one of several purchasers, who file a bill against the vendor to rescind the contract of purchase on the ground of fraud, is by amendment struck out as plaintiff and made a defendant, and charged with collusion with the vendor, and that charge fails of proof, his acts affect the case of the purchasers as much as if he continued a co-plaintiff.

Parol evidence cannot be received of acts or admissions which are not properly put in issue by the pleadings.

No weight is to be given to parol testimony which is contrary to the obvious construction of written documents, confirmed by the acts of the parties and their acquiescence, although hardly any length of time would bar them from redress against fraud if proved.—*Attwood v. Small*, 6 Cl. & F. 232.

22. Where a Court of Equity directs the second trial of an issue, the verdict on the first trial is not admissible in evidence on the second.—*O'Connor v. Malone*, 6 Cl. & F. 572.

See *King v. Simmonds*, 1 H. L. Cas. 754; *Macgregor v. Topham*, 3 H. L. Cas. 132.

23. A surveyor made a survey or report, which he furnished to his employers, being afterwards called as a witness he produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript.

Held, that he might look at this printed copy of the report to refresh his memory.—*Horne v. Mackenzie*, 6 Cl. & F. 628.

24. The minutes of evidence and proceedings before the Committee of Privileges in one case, are not necessarily receivable as evidence in

EVIDENCE—continued.

another case.—*Braye Peerage*, 6 Cl. & F. 757.

See *The Donoughmore Case*, 3 H. L. Cas. 822.

25. Old pedigrees produced from the custody of a person whose ancestor was connected by marriage with the family described in the pedigree, are admissible as evidence to show the state of that family; and an inscription on an old portrait of that family, produced from the same custody, is admissible for the same purpose.—*Camoy's Peerage*, 6 Cl. & F. 789.

26. On the trial of an issue, "whether (during a certain period) there arose from the works of the defenders certain noisome, offensive, noxious, or unwholesome smoke and other vapours, to the nuisance of the pursuer, whereby the produce of his garden was deteriorated," evidence was adduced for the pursuer to show that the smoke and other vapours from defenders' works had injured the produce of other grounds in the neighbourhood; and for the defenders to show that their works did not injure the produce of any other grounds; and one of the defenders' witnesses having, in his examination in chief, described several gardens in the neighbourhood of the works as in the utmost health, was asked in cross-examination by pursuer's counsel, if he knew Glasgow-field (grounds in the neighbourhood); and having answered that he "knew Glasgow-field, and had never known of any damage done there," he was then asked, "whether he had known of any sum having been paid by the defenders to the proprietors of Glasgow-field, for alleged damage there occasioned by these works?"

Held, by the House of Lords (overruling the judgment of the Court of Session), that the question was incompetent, as leading to a new collateral inquiry which, answered either way, could not affect the issue, or test the credit of the witness; if he answered that money had been paid, the payment would not be proof of damage done, as it might have been paid to buy peace.—*Tennant v. Hamilton*, 7 Cl. & F. 122.

EVIDENCE—continued.

27. Evidence is not to be received of admissions or declarations made by parties, and not put in issue by the pleadings. — *Copland v. Toulmin*, 7 Cl. & F. 350.
 28. The book kept at the *British* ambassador's hotel in *Paris*, in which the ambassador's chaplain makes and subscribes entries of all marriages of *British* subjects celebrated by him, has not the authority of an *English* parish register. An attested copy of an entry in it is not admissible to prove a marriage. — *Athlone Peerage*, 8 Cl. & F. 262.
 29. The question whether a person is principal or surety in the grant of an annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose. — *Hollier v. Eyre*, 9 Cl. & F. 1.
 30. Part of an old indenture relating to lands, the subject of a suit, appearing to have been severed with a sharp instrument, formerly in the custody of the plaintiff's steward until litigation commenced between them, afterwards handed over to the succeeding steward, from whose custody it is produced at the trial, is admissible in evidence against the plaintiff, in support of the case of the defendant, who derived title from the former steward. — *Trimlestown (Lord) v. Kemmis*, 9 Cl. & F. 780.
- The objection that a deed tendered in evidence has been mutilated, applies rather to the value of the evidence than to its admissibility. — *Id.*
- If a deed is admissible in evidence for any purpose, an exception to it ought not to be allowed. — *Id.*
- Declarations made by a party in possession of an estate, in his answer to a bill in Chancery, are admissible in evidence against him, and persons deriving from him; but declarations by him of what he heard another person state, he not adding that he believed the statement, are not admissible to cut down or defeat his estate. — *Id.*
31. The case of a claimant to a peerage depending on the genuineness of entries written in an old Prayer-

EVIDENCE—continued.

- book, and dated 1728 and 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages, that they could take on themselves to name the period in which any manuscript up to the year 1700 was written, were all of opinion that the entries were written in the early part and before the middle of the last century, and at or about the period of their date :
- Held, that such evidence is but small testimony, hardly entitled to any weight, especially when the book containing the entries was not satisfactorily identified. — *Tracy Peerage*, 10 Cl. & F. 154.
- A claimant, after his case was referred to the House of Lords, and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in *Ireland*; which if proved, would sustain his claim. The tombstone could not be produced. Several witnesses from the neighbourhood swore positively that they saw the tombstone and inscription about 20 years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them :
- Held, that the evidence of the existence of the tombstone, or of the inscription, was not sufficient; and that the neglect of the claimant to produce this material part of his case earlier, induced a suspicion of fraud, which could not be removed without the production of the tombstone or of other witnesses of greater credit from the neighbourhood. — *Id.*
32. On a claim to an ancient peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, proof of the handwriting being given by a witness who had been for many years inspector of franks and official correspondence, and who said that from a few inspections he had had of two or three of the documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the

EVIDENCE—continued.

character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting :

Held, that the evidence was inadmissible.—*The Fitzwaller Peerage*, 10 Cl. & F. 193.

See 17 & 18 Vict. c. 125, s. 27, and post, No. 61.

33. Where an accused person is supposed to be insane, a medical man who has been present in Court, and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.—*Mc Naghten's Case*, 10 Cl. & F. 200.
34. The residuary estate of a testator who died in 1785, was paid into the Exchequer in 1794, under a decree in an administration suit establishing the right of the Crown thereto, for want of heirs or next of kin of the testator. Parties claiming title to the fund in both characters in 1825, were permitted to go before the Master for the purpose of making out their claim. In support of their title, they produced a narrative in the handwriting of J. T. (found in his repositories at his death in 1792, not made public in his lifetime), containing a genealogical account of his family, of which it represented the testator to have been a member ; it purported to be founded chiefly on hearsay, and not to be perfect, and it was erroneous in many particulars. The testator in his will declared that he had no living relation, and that J. T., to whom he left a legacy, was not a relation. The narrative was admitted in evidence upon the trial of an issue directed by the Court of Chancery, to ascertain whether the claimants were next of kin of the testator. The verdict being against them, the Court refused a new trial. The House of Lords affirmed that judgment, and disposed of the claimants' case on the merits, on the ground that they had no material new evidence to give, and that the narrative, taken in conjunction with

EVIDENCE—continued.

the testator's will, negatived their title.—*Robson v. The Attorney General*, 10 Cl. & F. 471.

Quære, whether the narrative was legally admissible in evidence in Courts of Equity?—*Id.*

35. A copy of a will produced from the Prerogative Office was received, after proof that searches had been made for the original, and that the practice in the office, at the time of the date of the will, was to give out the original wills after making copies.—*The Fitzwaller Case*, 10 Cl. & F. 946.

An old attested copy of a deed of settlement, produced from the proper custody, was received after proof of unsuccessful searches for the original, and proof that the possession of the estates comprised in the settlement went with it :

Held also, that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant, together with property formerly belonging to that ancestor,—was a competent witness to prove the handwriting of the pedigree.—*Id.*

36. The wife of a peer of the realm left him in 1808, a year after their marriage, and instituted a suit in the Ecclesiastical Court for nullity of the marriage, *propter impotentiam*. Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in *Scotland* ; and during many years' cohabitation with him had several children, who were named after him and educated as his children, but in 1823 they and their mother assumed the name and titles of the peer. He generally lived abroad, had no access to his wife after she left him, but knew of her infidelity, and took no proceedings to dissolve their marriage or illegitimate the children. Upon the petition of his brother, heir presumptive to his titles, stating these facts, and alleging that the peer was likely to

EVIDENCE—*continued.*

survive all the witnesses to them, and praying protection to the descent of the titles :

The House of Lords held, that the petitioner, although by law he might perpetuate evidence regarding titles of honour in Chancery, was entitled to have a private Act of Parliament, and on proof to the satisfaction of both Houses of Parliament of the facts above stated, an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage. — *The Townshend Peerage*, 10 Cl. & F. 289.

37. Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.—*Bourne v. Gallif*, 11 Cl. & F. 45.

38. In a claim of peerage, where the question was whether the deceased peer had been married or not, a Prayer-book, found after the death of the claimant's mother among her papers, was received, and an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it, made by one of the parties at the time.—*Sussex Peerage Case*, 11 Cl. & F. 85.

A will of a deceased peer, made many years before his death, declaring, and in the most solemn form, his marriage, and the legitimacy of his son (the claimant of the peerage), was proposed to be read as a declaration made by one of the parties; but it was rejected, because the date, and certain expressions in it, showed it to have been written after a suit to annul a marriage of the deceased peer had been instituted by his father, and because there was nothing to show that that marriage was not the very marriage in question.—*Id.*

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between the deceased peer and his alleged wife, are not receivable in evidence as the declaration of a deceased party made against his own interest; such interest not being of a pecuniary nature.—*Id.*

EVIDENCE—*continued.*

The law does not recognise the apprehension of possible danger of a prosecution, as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence, upon the ground of their being declarations made against the interest of the party making them.—*Sussex Peerage Case*, 11 Cl. & F. 85.

A professional or official witness giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence.—*Id.*

A Roman Catholic bishop, holding the office of coadjutor to a vicar apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law.—*Id.*

See *Dos d. Padwick v. Wittcomb*, 4 H. L. Cas. 425; *Brook v. Brook*, 9 H. L. Cas. 193.

39. A decretal order in Chancery, reciting the substance of the bill and answer is admissible, on proof of pedigree, to establish the identity of parties to the suit. But an answer alone, though sworn but not filed, is not admissible.—*Wharton Peerage*, 12 Cl. & F. 295.

Scotch wills, registered in the Court of Session are retained there, and if it is necessary to prove any such wills in England a certified copy is given out, and is admitted to probate in the English Ecclesiastical Courts. The Lords' Committees for privileges will not, on claims of peerage, receive such copy unless it is shown that the original will cannot be produced.—*Id.*

Private Acts of Parliament are evidence of the facts recited therein.—*Id.*

The recitals of a private Act of Parliament, passed to enable parties therein named to sell certain estates, and stating the relationship of those parties, are evidence of that relationship.—*Id.*

But see, now, *The Shrewsbury Peerage Case*, post, No. 61.

EVIDENCE—*continued.*

40. In a *quære impedit*, where the Bishop of *Derry* claimed the right of patronage of a living in the county of *Londonderry*, which was within the diocese of *Derry*, a surrender made by a former bishop to the Crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the Crown, dated two days afterwards, of the livings which had been so surrendered. Taken together, these documents were held to be admissible in evidence; and as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was for the purpose of proving the title of the bishop, received as an admission by the Crown of that fact. The value of such evidence was still open to dispute. Before the date of the grant, the Crown had entered into articles of agreement with persons now represented by the governors and assistants of the *Irish Society*, to grant to them the livings in the county, of which the living in question was named as one:

Held, that this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected.—*The Irish Society v. The Bishop of Derry*, 12 Cl. & F. 641.

Two letters from the Crown to two successive bishops of *Derry*, directing them to perform the covenants and directions contained in the grant, were tendered in evidence as recognition by the Crown of its previous grant:

Held, that they were admissible for this purpose.—*Id.*

Entries in the books, kept at the First Fruits Office, are admissible to show the fact of a collation to a living made by the bishop at a particular time.

Returns made by the bishop in obedience to writs from the Exchequer, requiring him to state the vacancies of representations and collations to the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty.

Though such returns may contain statements of a kind unusual in such

EVIDENCE—*continued.*

documents, which sentiments were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the inquiry in the writ.

An original collation from the registry of the bishopric, and appearing on the face of it to be *pleno jure*, is admissible to show that the right claimed has in fact been exercised.

An objection was taken that certain documents tendered in evidence were not admissible for a particular purpose. The Court decided that they were admissible. An exception was taken to this decision:

Held, that the documents were admissible on any ground, the exception could not be sustained—*The Irish Society v. The Bishop of Derry*, 12 Cl. & F. 641.

See *Malcomson v. O'Dea*, 10 H. L. Cas. 593.

41. To render a person incompetent in the *Scotch Courts* to be a witness, he must have a direct and immediate interest in the result of the suit in which he is called to give evidence, or he must be able to give the verdict in that suit in evidence in his own favour in another proceeding. An interest in the result of a suit, which is to render a person incompetent to be a witness, must be an interest of a substantial nature, and it must be the direct and necessary result of the suit. The law was the same in *England* and *Scotland* upon this point previous to the passing of the 6 & 7 Vict. c. 85.—*Willox v. Farrell*, 1 H. L. Cas. 93.

42. A testator, who described himself as of "*Ashford Hall*, in the county of *Salop*," devised "all my estate in *Shropshire* called *Ashford Hall*," to trustees, for sale:

Held, that a Court of Equity, in a suit to enforce the trusts of the will, might receive parol evidence to show what the testator had been accustomed to consider as the *Ashford Hall Estate*.—*Ricketts v. Turquand*, 1 H. L. Cas. 472.

See *Boyes v. Rossborough*, 6 H. L. Cas. 2; *Peck v. North Staffordshire*

EVIDENCE—continued.

Railway, 10 H. L. Cas. 473; *Malcomson v. O'Dea*, 10 H. L. Cas. 593.

43. The illegitimacy of a child, born of a married woman, is established beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible.—*Barony of Saye and Sele*, 1 H. L. Cas. 507.

Where a patent of peerage cannot be found, entries on the journals of the House of Lords, showing the limitations of the patent, may be referred to for that purpose; and an examined copy of the record of the patent will be received.—*Id.*

44. There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act, because the doing of it would make him guilty of an offence against the law. In every instance the circumstance of the case must be considered.—*Lapsley v. Grierson*, 1 H. L. Cas. 498.
45. A copy of an entry made from a certificate of baptism by a chaplain of a British minister at a foreign court, is not sufficient evidence of birth and parentage.—*Lord Dufferin and Claneboye's Claim*, 2 H. L. Cas. 47.
46. Where a paper purports to be a receipt, and as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped. Its admissibility under such circumstances is restricted to this extent, so far as it relates simply to proving the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way. If a document which is unstamped, but requires a stamp, is offered in evidence, and if stamped would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received

EVIDENCE—continued.

in evidence. In an action for work and labour there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time:

Held (reversing an interlocutor of the Court of Session), that it was admissible for that purpose.—*Matheson v. Ross*, 2 H. L. Cas. 286.

47. The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof. Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them by a regularly ordained clergyman, in a private house, as if by special licence, and the parties by their acts at the time, showed that they believed such marriage to be a real and valid marriage; the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.—*Piers v. Piers*, 2 H. L. Cas. 331.
48. Where the fact of bankruptcy is not put in issue by the bill, evidence of it is not admissible at the hearing of the cause.—*Archbold v. Commissioners of Charitable Bequests in Ireland*, 2 H. L. Cas. 440.

EVIDENCE—continued.

49. Ancient documents of a public character, brought from the proper repository, are, in the absence of patents or Parliamentary records, admissible as evidence of the creation and existence of peerages. And *semble*, that by the law of *Scotland* contemporaneous history is admissible for the same purpose.

A witness brought to prove a copy of an old document, should be able to read and understand the original when he compared the copy with it.—*Crawford v. Lindsay Peerage*, 2 H. L. Cas. 534.

50. The terms "Protestant Dissenters" not having acquired a known legal meaning at a particular time, evidence may be received to show what was their meaning in a deed of that time, such as contemporaneous documents and usage, the acts of the party making the deed, and the circumstances in which he was when he made it, but not his particular opinions or declarations.—*Drummond v. Attorney General of Ireland*, 2 H. L. Cas. 837.

51. Attested copies of *French* registers of marriages, births, and deaths, held to be admissible evidence, upon the testimony of a *French* advocate that such registers were kept according to *French* law, and would be received in evidence in the *French* Courts.—*Perth Peerage*, 2 H. L. Cas. 865.

52. The law of a country where a contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on the trial arising out of the enforcement of such contract. (See *Don v. Lippmann*, 5 Cl. & F. 1).—*Bain v. Whitehaven Railway Company*, 3 H. L. Cas. 1.

The Companies Clauses Consolidation Act for *Scotland* (8 & 9 Vict. c. 17, s. 9), requires, in the same terms as the *English* statute of that name, a book to be kept, containing, in alphabetical order, "the names of the shareholders, with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its

EVIDENCE—continued.

number, and the amount of the subscriptions paid on such shares." The 29th section of the statute makes such book *prima facie* evidence of a person being a shareholder:

Held, first, that as this was an exceptional privilege in favour of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and, secondly, that an entry in the book, describing A. as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence.—*Bain v. The Whitehaven Railway Company*, 3 H. L. Cas. 1.

The statute requires that a book, to be called "the Register of Shareholders," shall be kept. The book actually kept was marked "Register of Proprietors."

Held, that this variation in the title did not prevent it from being given in evidence.—*Id.*

53. In every issue of *devisavit vel non*, a Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined.—*McGregor v. Topham*, 3 H. L. Cas. 132.

54. In an action of libel, the defendant pleaded the general issue, and also a plea, under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of:

Held, that these publications were admissible in evidence.—*Barrett v. Long*, 3 H. L. Cas. 395.

55. The 54 Geo. 3, c. 68, s. 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to

EVIDENCE—continued.

the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licences" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled," he shall forfeit 50*l*.

On the trial of an action for penalties brought on this statute, evidence from certain Ecclesiastical Courts was tendered, to show that it was customary for the registrar to do these acts, and to receive fees on account of doing them :

Held, that such evidence was properly admitted.—*Stevenson v. Higginson*, 3 H. L. Cas. 638.

56. In an action of ejectment the question was, whether certain lands, known as *Kingston Pastures*, were part of the manor of *Hayling*. The lands had been purchased from the Duke of *Norfolk*. An entry in a book found among the muniments of the *Norfolk* family was tendered in evidence, for the purpose of proving the affirmative of the issue. The entry, which was made by a steward of that family, spoke of an indenture which "recited a lease made by the Earl of *Arundel*," and which, tracing the lands into the possession of *R. H.*, went on to say, that "*R. H.*, demiseth unto, &c., all those pasture grounds lying in *Kingston*, in the parish of *Portsea*, parcell of the manor of *Hayling* :"

Held, that this entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made by a person in the discharge of his duty, or as an entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor.—*Dos d. Padwick v. Wittcomb*, 4 H. L. Cas. 425.

EVIDENCE—continued.

57. A memorial of a lease for lives of lands in *Ireland*, with a covenant for perpetual renewal, was executed there in 1746, and was registered under the provisions of the *Irish Registry Acts*. In 1845 the owner in fee of these lands disputed his liability to renew. On a bill filed by the assignee of the lease to compel a renewal, the memorial (the original lease being lost) was received as secondary evidence of the covenant contained in the lease. Several renewals had been granted between 1746 and 1845, and the acts of the successive tenants of the estate in granting these renewals, though not evidence to prove the existence of the covenant, were held to become, when the covenant had been proved, evidence of the construction which the parties interested had put upon it.—*Saillier v. Biggs*, 4 H. L. Cas. 435.

58. The evidence of a single witness cannot be received against the answer of a defendant, unless there are circumstances which go to corroborate the witness as against the answer.—*Jorden v. Money*, 5 H. L. Cas. 185.

59. *A.*, *B.*, and *C.* were committees of a lunatic. To a bill filed against the lunatic and themselves, as committees, they put in an answer stating certain facts. That cause went to issue, and witnesses were examined. The lunatic died; *A.* and the wives of *B.* and *C.*, who were relatives, obtained letters of administration to her estate as her next of kin. The plaintiff in the original suit then filed a bill of revivor against *A.*, the two wives, and their husbands, merely praying for a revival of the suit. The ordinary order was made. The defendants to the bill of revivor put in an answer, in which they craved to have the full benefit of the answer to the original bill; there was no replication to this answer. The original answer contained statements which at the hearing were admitted to be read against the defendants :

Held, that under the circumstances of this case these statements were properly admitted in evidence.—*Stanton v. Percival*, 5 H. L. Cas. 257.

EVIDENCE—continued.

Quære, where there is no replication to the answer to a bill of revivor, is a plaintiff bound, if he relies on the original answer, to take it as absolutely true in all particulars?

Is an answer by committees binding upon the estate of the lunatic? It is binding on them in any other character.—*Stanton v. Percival*, 5 H. L. Cas. 257.

60. A plaintiff claimed to have been appointed to an office for life. For the purpose of proving disturbance in the office, he gave in evidence certain letters of the defendant, and a notice. In these letters and notice the office was described as being held only during pleasure:

Held, that though not proof of the truth of the statements contained in them, they were admissible evidence of the fact that such statements were made, and were properly left to the consideration of the jury, on the question as to what had in fact been the nature of the appointment.—*M^r Mahon v. Lennard*, 6 H. L. Cas. 970.

61. A copy of a plate of the arms of the Knights of the Garter, now existing in the Chapel Royal at Windsor, was received in evidence, the plate itself not being removable, except by authority of the Queen, and no such plate having been removed since first put up in the reign of Henry V.—*Shrewsbury Peerage*, 7 H. L. Cas. 1.

See *post*, No. 66.

Though the rule in peerage cases is that the original will must itself be produced to the committee, a copy of a will brought by the officer from the Prerogative Court was admitted in evidence, such will having been made at a time when the course of the officers of that Court was to take copies of wills, and to return the originals to the executors, and the persons opposing the admission of the copy being the representatives of those executors.—*Id.*

Semble, that the recitals in private Acts of Parliament of very recent date are not evidence of the facts stated in them, such recitals being no longer submitted to the previous

EVIDENCE—continued.

approval of the judges. (See *Whar-ton Peerage*, 12 Cl. & F. 302).—*Shrewsbury Peerage Case*, 7 H. L. Cas. 1.

When the Legislature has directed that a particular rule as to evidence shall be adopted "in every court of civil judicature," though these words do not include a Committee for Privileges, such Committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 Vict. c. 125. s. 27, which permits in all courts of civil jurisdiction comparison of handwriting as a means of evidence, was therefore adopted by the Committee.—*Id.*

In 1761, the Crown issued a commission to authorise the College of Heralds to receive and record the family pedigrees of all such "benefactors," as should be willing to contribute sums of money for the rebuilding of the Heralds' College, before then destroyed in the great fire of London. A pedigree so furnished to the college by a member of a family, and the signature to which was proved, was received in evidence, but only as a declaration of a member of the family.—*Id.*

The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility does not extend to statements made by the wife's father.—*Id.*

The book called "Arms and Descents of the Nobility, E. 16," though produced from the Herald's College, is not admissible in evidence, not being kept under authority of any official order, or in discharge of any official duty.—*Id.*

A nobleman who had the wardship of another nobleman, under a grant from the Crown, made a will. This will contained a statement of the marriage of the ward with the testator's daughter, accompanied by a direction, that in the event of the death of the ward, his younger brother should marry the lady. The will was tendered in evidence to prove that the ward had a younger brother. *Quære*, whether it was admissible?—*Id.*

An old "collection of monumental

EVIDENCE—continued.

inscriptions" in country churches held inadmissible to show what had been the inscription on a partly defaced tomb.—*Shrewsbury Peerage Case*, 7 H. L. Cas. 1.

Letters addressed to a lady who had married into a particular family were produced from the custody of a member of that family, who likewise possessed many other family papers and deeds, and held by descent some of the property formerly belonging to the husband of the addressee of the letters:

Held, admissible in evidence, to show in what character she was addressed by members of her own family.—*Id.*

Bill filed in Chancery by A., as next friend to B. The defendant put in an answer, which was not signed; but there was indorsed a consent by A., that this answer should be received without oath. The bill and answer were produced from the proper office:

Held, that they were admissible in evidence.—*Id.*

A pedigree, "touching the name and families of *Talbots*," though proved to be in the handwriting of a former Garter King of Arms, not being shown to be a book kept by him in discharge of his duty in that office, held inadmissible.—*Id.*

A visitation was produced from the proper office; the commission under which it was taken could not be found. The visitation purported to have been taken by deputation from Clarenceux King of Arms. The deputation was produced. It recited the commission, and the power therein contained for Clarenceux to appoint his deputies:

Held, that the visitation was admissible in evidence.—*Id.*

A record of a Royal warrant of precedence was produced from the Heralds' Office; the original had been sought for at the Home Office and the State Paper Office, but in vain. It was a part of the duty of the heralds to record such warrants. The record was received in evidence.—*Id.*

W. T. erected in a church a monument

EVIDENCE—continued.

to the memory of T., whom he described in the inscription thereon to have been his (W. T.'s) father. The inscription had been put up after W. T. had been engaged in a controversy as to his relationship with C., but it did not directly relate to that controversy. It was admitted in evidence.—*Shrewsbury Peerage Case*, 7 H. L. Cas. 1.

It was necessary to prove that W. T. married M. D.; there was no certificate of marriage found, but the will of M. D.'s uncle was produced. It was in these words: "All this I give to my nephew, W. T." (who was identified as the W. T. in question). And the Act Book from Doctors' Commons was produced, granting administration to "W. T., nephew, minor, and universal legatee." Received as proof that a marriage had taken place between W. T. and M. D.—*Id.*

62. A conversation between a connexion of a family and some of the members of the family on the subject of a marriage supposed to have taken place in that family, cannot be given in evidence without previous proof that the persons with whom the conversation took place are dead.—*Butler v. Mountgarrett*, 7 H. L. Cas. 633.

A controversy in a family, though not at that moment the subject of a suit, constitutes a *lis* sufficient to render inadmissible in evidence a letter written on that subject by one of the members of the family, and addressed to another member of it.—*Id.*

S. B., H. B., and P. B., were, in 1816 (in this order of succession), the expectant heirs of a person who was then childless. In that year S. B. wrote to P. B. a letter, stating circumstances respecting an alleged marriage of H. B. in 1811, which, if true, would have the effect of handing over the succession to P. B.'s children. The then holder of the property did not die till 1846:

Held, in an ejectment afterwards brought by the children of P. B., that this letter was not admissible in evidence.—*Id.*

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EVIDENCE—continued.

63. Where parcels are described in old documents by words of a general nature, or of doubtful import, evidence of usage is proper to be received to shew what they comprehend.—*Waterpark (Lord) v. Fennell*, 7 H. L. Cas. 660.

In 1704 was granted a lease of certain land in the county of *Tipperary*. The land was described in the demise, as "lands, &c. in *Scartany*, containing 94 acres; *Garryroan*, containing 104 acres; and the village of *Scartnaglowrane*, and part of *Whitechurch* and *Tincurry*, containing 148 acres, with all rights;" there was then a reservation of mines and of the liberty of fishing and fowling, in favour of the lessor, and of "the liberty of commonage and cutting of turf on the mountain of *Tincurry*," in favour of certain specified tenants of the lessor. The lease was a renewable lease, and had been renewed twice since that period, in the same terms. The mountain was equally known by the name of the mountain of *Scartnaglowrane*, or of *Tincurry*. There was a collection of houses generally called the village of *Scartnaglowrane* on one of its sides. The village of *Tincurry* was at some little distance from it. The houses of the former village, and the arable land attached to them, had from time to time been increased in number and extent at the pleasure of the lessee and his under tenants, who regularly paid him rent for the same, and their cattle alone grazed on the mountain. The lessee had always sported on the mountain:

Held, that these facts had been properly admitted in evidence, to explain the words of the demise, and having been so, the judge ought to have left to the jury, and ought not to have decided of his own authority, the question whether the mountain of *Scartnaglowrane* passed under the demise.—*Id.*

64. If a bill in equity is supported only by the testimony of a single witness, and is positively, clearly, and precisely denied by the defendant, it will be dismissed: *secus*, if it is cor-

EVIDENCE—continued.

roborated by letters of the defendant or other sufficient evidence.—*Smith v. Kay*, 7 H. L. Cas. 750.

65. The Committee for Privileges will, in its discretion, permit documents to be proved by printed minutes of proceedings before a former Committee on the same peerage, but, as a rule, will require the production of the original documents.—*The Berkeley Peerage*, 8 H. L. Cas. 21.

Semble, that where the nature of the peerage, and not the pedigree of the claimant, is in question, a plate erected in *St. George's Chapel, Windsor*, on the installation of a particular person, as a Knight of the Garter, is not admissible in evidence.—*Id.*

A report of the proceedings on a claim of peerage in a previous case, can only be referred to for the purposes of argument, but cannot be received as evidence.—*Id.*

66. A name and a description of a legatee were given in a will, which, taken together, could not be applied to any one person; evidence of the state of the family was admitted, and an affidavit of the solicitor who prepared the will was offered to shew what had been the cause of the mistake:

Held, that this affidavit was not admissible in evidence.—*Drake v. Drake*, 8 H. L. Cas. 172.

67. A will was made by *Henry VIII.*, directing provision to be made for a charity. This will was carried into effect by a deed made in the reign of *Edward VI.* A copy of it, found in the chapter house at *Westminster*, had the Great Seal attached to it, but was not shown to have been executed by the grantees, whose muniments, however, contained an unexecuted copy of it, and they had entered into possession of the lands, and rendered accounts to the Crown in accordance with its provisions:

Held, that the proof of its execution by them was unnecessary.—*Attorney General v. The Dean &c. of Windsor*, 8 H. L. Cas. 369.

EVIDENCE—continued.

68. In an action for the infringement of a patent, the opinion of scientific witnesses that there has, or has not, been an infringement, ought not to be received.—*Seed v. Higgins*, 8 H. L. Cas. 550.
69. The rule of evidence in pedigree cases has not been relaxed of late years.—*Attorney General v. Köhler*, 9 H. L. Cas. 654.
70. The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will.—*Enokin v. Wyllie*, 10 H. L. Cas. 1.
71. In an action against persons alleged to have trespassed on the several fishery of the plaintiff, there was a dispute as to the limits of the fishery. The plaintiff, the lessee of a corporation, tendered in evidence the bill and answer in Chancery in a suit instituted a great many years before by another grantee of the Crown against the corporation, and in which the limits of the alleged fishery were described :
- Held, that as part of the history of the fishery and of the claims made to it, the bill and answer were admissible in evidence.—*Malcomson v. O'Dea*, 10 H. L. Cas. 593.
- The plaintiff also tendered in evidence an "Assembly Book," belonging to the corporation, dated in 1676, and containing entries of the rents due to the corporation from its various tenants, among which were entries of rents paid in respect of this fishery :
- Held, that the book was admissible as an ancient document showing the exercise of acts of ownership.—*Id.*
- The plaintiff also tendered in evidence for the purpose of showing the meaning of a particular phrase in the grants, a letter of licence from the Crown, in 1676, to one of its grantees, to aliene the subject-matter of the grant :
- Held, that the licence was admissible for that purpose.—*Id.*

EVIDENCE—continued.

72. Evidence of mere immemorial usage will not support a claim of anchorage dues, claimed in respect of the use of the soil.—*Gann v. The Free Fisheries of Whitstable*, 11 H. L. Cas. 192.

EXCEPTIONS, BILLS OF. See INSURANCE. PLEADING. PRACTICE.

1. A landlord having obtained sequestration of his tenant's crop and stock for arrears of rent, the tenant's agent offered to advance the arrears and expenses on the landlord's granting him assignation to the sequestration : and on the landlord's declining, repeated his offer to pay the whole money for which warrant had been taken to sell. The landlord, after four days, accepted the offer, and engaged to grant the agent the assignation, to the end he might operate his payment from the tenants. In an action for damages brought by the tenants against the landlord, an issue having been directed to try "whether he had wrongfully failed to relieve the crop and stock from the sequestration, to their injury," the judge at the trial directed the jury that the sequestration ought to have been withdrawn after the tenders, and not having been withdrawn till the expiration of four days after the second tender, the landlord was in law responsible to the tenants. An exception to that direction was disallowed by the Court of Session, not affirming that the judge was right on the point of law, but holding the direction to be warranted by the circumstances :

Held, by the Lords (reversing that judgment), that unless the law as laid down by the judge was correct, his direction was exceptionable, and could not be supported on other grounds *dehors* the bill of exceptions.—*Gordon v. Graham*, 8 Cl. & F. 107.

In the Lord Chancellor's opinion, the offers made by the agent did not raise a responsibility on the landlord to withdraw the sequestration.—*Id.*

Quære, whether a landlord is bound by any offers to assign sequestration

EXCEPTIONS, BILLS OF—*continued*.

of his tenant's stock to a third party?
—*Gordon v. Graham*, 8 Cl. & F. 107.

2. A Court of Error in *England* upon a bill of exceptions brought before it by writ of error, is bound to decide on the validity of the exceptions, and to allow or disallow them; and also to correct any errors in the record to which the bill of exceptions is annexed; and to affirm or reverse the judgment of the Court below according to law. But such Court cannot select a part of the evidence set forth in the bill of exceptions, not being the subject of exception, and decide the cause on arguments applied to that part of the evidence, or on the consideration of its bearing on the merits of the case.—*Secus*, in the case of a special verdict or demurrer to evidence.—*Trimleston (Lord) v. Kemmis*, 9 Cl. & F. 749.

The *Irish Acts*, 28 Geo. 3, c. 31, and 40 Geo. 3, c. 39, have not given the Court of Error in *Ireland* any larger power, or different rule of law, for adjudicating on the record and bill of exceptions brought before it, than those which belong to and govern the Courts of Error in *England*.—*Id.*

It is not a good ground of exception that the judge has admitted in evidence part of an old indenture (which appeared to be produced from the proper custody) relating to the lands in dispute in the case, the indenture appearing to have been severed in two by a sharp instrument. The objection to the indenture applies to its value, not its admissibility.—*Id.*

3. If, upon a bill of exceptions to the judge's charge to the jury, the Superior Court should see that there was a misdirection calculated to mislead the jury in the verdict, the Court has no discretion, but must allow the exception, and direct a new trial, even though the verdict may be right.

Secus, in case of a motion for a new trial on the ground of misdirection.—*Househill Coal Company v. Neilson*, 9 Cl. & F. 788.

EXCEPTIONS, BILLS OF—*continued*.

4. Evidence of foreign law was tendered on the trial of an issue before a jury. It was objected to, on the ground that, as the issue did not in form raise any question of foreign law, the evidence was a surprise on the party against whom it was produced. The evidence was admitted, and the objection of surprise was put on the record as one of the heads of a bill of exceptions. The evidence was really inadmissible, on the ground that the *lex fori* was that by which alone the issue could be decided; but no notice of this ground of objection was taken in the bill of exceptions:

Held, that the Court of Error could not look beyond the bill of exceptions, but must decide on that alone, and that the objection of surprise was not sufficient to exclude the evidence.

An exception abandoned in the Court below was allowed to be argued in this House.—*Bain v. The Whitehaven Railway Company*, 3 H. L. Cas. 1.

5. A bill of exceptions, which sets forth what a judge was asked to direct, and alleges that he refused to give such direction, is informal and bad. A bill of exceptions should state what directions the judge gave, as it is misdirection, and not non-direction, which is the subject of the bill.—*Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

EXCHANGE OF LANDS.

The statute of 6 & 7 Will. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions, an appeal to the Quarter Sessions.

Semble, that this would not deprive a party aggrieved of his right to the interference of a Court of Equity.—*Beaufort (Duke) v. Neeld*, 12 Cl. & F. 248.

EXCHEQUER. *See* EXECUTION WHEN EXECUTED. JURISDICTION. PRACTICE.

EXCHEQUER LOAN ACTS.

A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment with interest. By several statutes the Exchequer Loan Commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls, profits, &c. of such works, and priority is given to mortgages given to the commissioners over mortgages made to private individuals, except *bonâ fide* creditors who at the time of the advances by the commissioners are entitled to repayment. One of the statutes (57 Geo. 3, c. 34) provides that where four-fifths in value of the creditors shall agree in writing that a priority over their claims shall be given to the commissioners, such consent shall be binding on all the creditors. The creditors of this company entered into an agreement, by which they consented to give the commissioners mortgage priority over their own securities "in manner following:" in the first place that the commissioners should, out of the annual rates, &c., be paid interest; in the next, that the creditors should be paid interest; and lastly, that the surplus should be then applied in discharge of the principal sum advanced by the commissioners until that principal sum should be repaid, in preference to all other claims:

Held, that an agreement giving this qualified priority to the commissioners was valid under the statute.—*South Eastern Railway Company v. Jortin*, 6 H. L. Cas. 425.

The 1 & 2 Will. 4, c. 24, gave the commissioners, in case of default of payment, power to enter and sell. The 5 & 6 Vict. c. 9, enacted that the property sold by the commissioners should be held freed and discharged from all claim and demand of the mortgagors or of persons claiming under them, in all respects, as if they were foreclosed, "provided that nothing herein contained shall prejudice the rights" of any creditors "in respect of any surplus" arising on the sale:

Held, that under these statutes the

EXCHEQUER LOAN ACTS—continued.

commissioners had a legal right to enter and sell; that after their claim and interest had been satisfied, the surplus was liable for the interest due to the other creditors; but that this liability could be enforced against the commissioners only, and not against the purchasers.—*South Eastern Company v. Jortin*, 6 H. L. Cas. 425.

EXCISE.

1. Where a public officer of excise in Scotland [this was previous to 1807] suffered duties to be in arrear, and exacted interest on those arrears (the law and the practice of the office in Scotland allowing such exaction at that time), the party charged was held not to be entitled to recover back the interest.—*Young v. Leven*, 4 Dow, 138.

2. A. & Co. were tanners in Scotland. An excise officer laid an information against them on the ground that they, contrary to certain Scotch excise statutes, were at the same time engaged in carrying on the business of curriers. On this information the magistrates convicted A. & Co., and made a decree for the sale of the tanned leather seized. It was sold and bought in by A. & Co., who then brought an action in the Court of Session for repayment of the money thus expended, and for damages. The Court of Session entertained the suit, and ordered repayment of the money expended. On appeal, founded chiefly on the objection that being a matter relating to revenue, the Court of Session (the question as to damages being gone) had no jurisdiction in the matter:

Held, that the decision of the Court of Session must be affirmed.—*Campbell v. Anderson*, 5 Dow, 412.

3. The Act 6 & 7 Will. 4, c. 38, s. 3 (*Ir*), extends to prevent a person who is already a publican, from obtaining a license to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person licensed as a grocer, from carrying on in the same premises the business of a publican.—*McKenna v. Pape*, 1 H. L. Cas. 6.

EXCISE—continued.

4. The 6 & 7 Will. 4, c. 38 (*Ir.*), s. 3, did not repeal the previous statute, 6 Geo. 4, c. 81, s. 2, and the schedule thereto, but both were to be read together. Therefore, when sect. 3 of the 6 & 7 Will. 4, c. 38, was itself repealed, the provisions of the 6 Geo. 4, c. 81, still continued, and a person in *Ireland* licensed to trade in grocery, and obtaining a spirit licence, was liable to the larger duty charged by the earlier statute on a person of that description, as fixed by the schedule to the 2nd section of that statute. — *Dickson v. The Queen*, 11 H. L. Cas. 175.

EXECUTION, WHEN EXECUTED.

Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *fi. fa.*, and shall satisfy the Crown's debt without regard to the previous execution. — *Giles v. Grover*, 1 Cl. & F. 72.

EXECUTOR. See ATTORNEY AND CLIENT, 4. TRUSTS.

1. A., a partner in a house in *India* borrowed money and made a deposit of property with the lenders to secure repayment. A. made his will by which he appointed B., one of his partners, his executor. A. then returned to *England*. There were other executors in *Scotland*, where he also had property. A. died. The executors in *England* took out probate, and sent to B. to say that they had forwarded to him a power of attorney, and that he need not take out probate. He answered that he had already taken out probate, and he acted in the management of A.'s property:

Held, that he must be treated as executor in *India*, and not merely as the agent there of the *European* executors. — *Graham v. Keble*, 2 Dow, 17.

2. A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say;" and then, after specifying

EXECUTOR—continued.

various objects of his bounty, appointed "the said E. E. executor of this my last will and testament." The trusts of the will did not exhaust the estate:

Held, affirming a decree of Lord Chancellor *Cottenham*, that E. E. did not become entitled to the residuary personal estate for his own benefit, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. (*Dawson v. Clark*, 18 Ves. 247, affirmed). — *Elcock v. Mapp*, 3 H. L. Cas. 492.

The rule in such a case is, that where there appears a "plain implication or strong presumption," that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. — *Id.* 509, n.

See 11 Geo. 4 & 1 Will. 4, c. 40

EXPORTATION. See PORT.

The words, "shipped for exportation," are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense—that is, a carrying out of port. *Stockton and Darlington Railway Company v. Barrett*, 11 Cl. & F. 590.

EXTENT (IN CHIEF OR IN AID).

See ASSIGNMENT. EXECUTION.

A. & B. carried on business in partnership; they were also members of a firm which traded as C. & Co.; A. & B., for the purpose of paying off certain of their debts, assigned, in trust, to the other members of the firm of C. & Co., portions of their shares in that firm. The assignment, which was *bonâ fide*, was regularly intimated, and it was duly entered on the books of the firm. An extent at the suit of the Crown afterwards issued against A. & B.:

Held, that the portions of shares thus assigned could not be seized under the extent. — *Spears v. The Advocate General*, 6 Cl. & F. 180.

See *ante*, EXECUTION.

FACTOR. See PRINCIPAL AND AGENT.

A foreign owner of goods consigned them to a factor in *London*, to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the Custom House, by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount for which, as a factor, he had a lien on the goods :

Held, that under these circumstances he was not entrusted with the dock warrant, within the meaning of the 2nd section of the 6 *Geo. 4*, c. 94. There is a distinction between persons entrusted with goods, and with the documents mentioned in that Act. An entrusting with the bill of lading, for the purpose of the sale of goods, is not an entrusting with the dock warrant which represents those goods, notwithstanding that the possession of the bill of lading enables the holder of it to obtain possession of the dock warrant. — *Hatfield v. Phillips*, 12 Cl. & F. 343.

See 5 & 6 *Vict. c. 39*; and also *McEwan v. Smith*, 2 H. L. Cas. 309.

FAMILY ARRANGEMENT.

1. The widow, brother, and sister of an *American*, who died in *Italy*, leaving considerable personal estate in the hands of trustees in *Scotland*, agreed, by advice of their law agent, to compromise their respective claims to the succession, by taking equal shares. The widow, after receiving her share, brought an action in *Scotland* to rescind the agreement, on the ground of having thereby sustained injury through ignorance of her legal rights, and the erroneous advice of the law agent. There was no allegation of fraud against him, or against the parties to the agreement :

Held, that although the fair inference from the evidence was that she was ignorant of her legal rights, and would not have entered into the agreement had she known them, yet, as the extent of her ignorance and of the injury sustained was

FAMILY ARRANGEMENT—continued.

doubtful, and there was no proof of fraud or improper conduct on the part of the agent, she was bound by his acts, and affected by the knowledge which he was presumed to have of her rights, and was therefore not entitled to disturb the arrangement. — *Stewart v. Stewart*, 6 Cl. & F. 911.

See *Hall v. Raymond*, Cas. temp. Nap. 80; *Jenner v. Jenner*, 2 De G., F., & J. 359; *Potts v. Surr*, 34 Beav. 544.

2. *A.* and *B.*, father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of *A.* Certain estates were conveyed to trustees, with a power to sell, on the consent in writing of *A.* and *B.*, or the survivor, and to apply the produce of the sale in payment of the debts therein specified. *A.* was indebted to *D.* as trustee for an infirmary, and *A.* and *B.* had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against *A.* and against *B.* The amount of the sums thus due was stated in the deed. *D.* had some legal interest in the estates themselves. He was a party to the deed, and executed it :

Held, that this deed created a trust in favour of the infirmary of which he was a trustee. — *Montefiore v. Browne*, 7 H. L. Cas. 241.

In this deed there was a power of revocation to be exercised by *A.* and *B.* *A.* died without exercising it :

Held, that the power of revocation was then at an end. — *Id.*

In the deed executed by *A.* and *B.* there was a conveyance to certain persons, with a power of sale, to be exercised with the consent in writing of *A.* and *B.*, or the survivor of them. *A.* died without being concerned in any consent to a sale. *B.* afterwards borrowed money from an insurance company, the repayment of which was secured by mortgage of his estates, of which those that were the subject of the first deed formed part. In the mortgage to which the creditor under the first deed was a party, and which fully recited that

FAMILY ARRANGEMENT—continued.

deed, there was a power of sale given to the mortgagee :

Held, that this was a consent in writing sufficient to satisfy the words of the first deed.—*Montefiore v. Browne*, 7 H. L. Cas. 241.

FEIGNED ISSUE.

A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—*King v. Simmons*, 1 H. L. Cas. 754.

FIDUCIARY RELATION. See CONTRACT. FRAUD.**FI. FA. See SUIT IN EQUITY. EXECUTION.****FINE AND RECOVERY.**

By statute 14 Geo. 2, c. 20, a recovery is good if the deeds making the tenant to the *procipe* appear to have been executed at any time within the term in which the recovery is suffered, though such execution should appear to be subsequent to the judgment and award of the Court of Session, but also to the execution of that writ.—*Goodright d. Burton v. Rigby*, 2 Dow, 250.

See the statute 3 & 4 Will. 4, c. 74, for abolishing Fines and Recoveries.

FISHERY.

1. Salmon fishing with stake nets held to be illegal.—*Dalgleish v. Athol (Duke of)*, 5 Dow, 282.

See *Howe v. Mackenzie*, 1 Robinson, 1017 ; 6 Cl. & F. 628.

See also "Paterson on the Fishery Laws of the United Kingdom," p. 182.

2. The soil of navigable tidal rivers, as far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishing therein is *primâ facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might lawfully have been exercised by the Crown before Magna Charter, and if so exercised, the several fishery could, lawfully,

FISHERY—continued.

be afterwards made the subject of grant by the Crown to a corporation.—*Malcolmson v. O'Dea*, 10 H. L. Cas. 593.

When the grant of a several fishery has been made by the Crown to a corporation, and rent received by the Crown in respect thereof for a long period of time, the earliest grants describing it as "an ancient inheritance of the Crown," it was held that the lawfulness of the origins of the several fishery might be presumed.—*Id.*

3. The bed of all navigable rivers, and of all arms of the sea, is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, and the right to anchor is a necessary part of the right to navigate. This right never could have been interfered with by a grant from the Crown.—*Gann v. The Free Fishers of Whitstable*, 11 H. L. Cas. 192.

The grant, therefore, of an oyster-bed in an arm of the sea below low water-mark, must have been taken by the grantee, subject to the public right of navigation ; and he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right.—*Id.*

- A claim of an anchorage due cannot exist merely in respect of the use of the soil ; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due.—*Id.*

Evidence of mere immemorial usage will not support such a claim.—*Id.*

- A liability to make compensation for actual injury done to the oysters by anchoring, is not to be confounded with a liability to toll for casting anchor in the soil itself.—*Id.*

The Mayor of Colchester v. Brooke, 7 Q. B. 339, observed upon.—*Id.*

FOREIGN LAW. *See* BILLS AND NOTES, 2, 3, 4. PROBATE.

1. The creditors of a person resident in *Ireland* filed a bill in the *English* Court of Chancery, and obtained a decree for an account, &c., and afterwards (the property of the debtor lying chiefly in *Ireland*) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the *English* suit. The Court of Chancery in *Ireland* dismissed such second bill as for want of jurisdiction :

Held, that the judgment of the Court of Chancery in *Ireland* was erroneous, that the proceedings in the *English* Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in *Ireland*, namely, as *prima facie* evidence of right in the party who had obtained the judgment.

Held also, that this House could either remit the case with directions, or appoint a receiver, and take such other proceedings as the Court of Chancery in *Ireland* might have done.—*Houlditch v. The Marquis of Donegall*, 2 Cl. & F. 470.

See *Don v. Lippmann*, 5 Cl. & F. 1 ; *Cammell v. Sewell*, 5 H. & N. 728 ; *Norris v. Chambers*, 29 Beav. 246 ; *Cookney v. Anderson*, 1 De G., J., & S. 365.

2. *J. Y.*, born in *Scotland* but domiciled in *England*, bought a *Scotch* estate, paid part of the price, and for the remainder—which was declared to be a lien on the estate—he gave a bond, payable within a given time, if all pre-existing incumbrances affecting the estate should be then discharged. The vendor assigned the bond and real lien to the bank of *L.*, which gave *J. Y.* notice thereof. *J. Y.* finding that the incumbrances were not discharged at the expiration of the time for payment of the bond, deposited the principal and interest in the Bank of *Scotland*, and informed the assignees that the money was so consigned, but should be paid to them on producing discharges from the incumbrances. The assignees produced some discharges, and received a proportion of the deposit. The balance remained in

FOREIGN LAW—continued.

the bank on receipts taken in *J. Y.*'s name, up to the time of his death. *J. Y.* before his death executed in *England* several instruments in writing. In a will respecting his *Scotch* estate, he declared his will to be, that the said receipts of deposit should become the property of certain trustees of that estate, and be endorsed to them by his executors appointed in a will of his *English* property ; the money to remain in deposit until the titles of the estate should be cleared, and then to become the property of the vendor's representatives on payment of the bond. He then made a will respecting his *English* property, appointing executors, and afterwards cancelled it. He subsequently executed a trust-deed, disposing of his *Scotch* estate, and therein declared that he had, in a separate will respecting his *English* property, directed his trustees and executors to endorse the said receipts to the trustees of his *Scotch* estate. He afterwards made a will disposing of his *English* property, and thereby gave his goods and chattels, wherever situated, to his nephew, and appointed him sole executor and residuary legatee. The nephew obtained probate of the will, and claimed thereunder the bank deposit in a suit instituted in *Scotland* between him and the other claimants :

Held, first, that the *Scotch* Court had a right to look to the first will for discovering the testator's intentions respecting the deposited money ; secondly, that, without looking to that will, the trust-deed contained a sufficient declaration of *J. Y.*'s intention to appropriate the money to his trustees for payment of his bond.—*Yates v. Thomson*, 3 Cl. & F. 544.

Following up the principle that the *lex loci domicilii* governs the distribution of personal estate, the *Scotch* and all foreign courts are bound, in the interpretation of a testator's written declarations of intention touching his personal estate, situated within the foreign jurisdiction, to adopt the principles of construction applicable to such instruments by the law of the testator's

FOREIGN LAW—continued.

domicile, and that law, being matter of fact, is to be inquired after like other facts; but they are not bound to adopt foreign rules of evidence, every Court having its own technical rules of procedure.—*Yates v. Thomson*, 3 Cl. & F. 545.

See *Di Sora v. Phillips*, 10 H. L. Cas. 624.

3. The law of a country where a contract is to be enforced must govern the enforcement of such contract.

Where, therefore, bills were drawn and accepted, and became due in *France*, but the acceptor a *Scotchman*, before such bills became due, returned to *Scotland*, and there continued until his death:

Held, by the Lords reversing the decision of the Court of Session, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the *Scotch* law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in *France* during the absence of the debtor, and had obtained judgment against him.

- A Court which is called on to enforce a foreign judgment may examine into that judgment to see whether it has been rightly obtained or not.—*Don v. Lippman*, 5 Cl. & F. 1.

See *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Goldsmidt v. Casenove*, 7 H. L. Cas. 785.

4. The law of a country where a contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on the trial arising out of the enforcement of such contract.—*Bain v. Whitehaven Railway Company*, 3 H. L. Cas. 1.
5. If the circumstances of a case are such as would make it the duty of one Court in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court.—*Carron Company v. Maclaren*, 5 H. L. Cas. 416.

FOREIGN LAW—continued.

The fact of a foreigner having property in this country enables the Court here to make effectual an injunction issued to him; but, especially in the case of a foreigner who seeks no assistance from the Courts here, the issuing of such injunction ought clearly to be shown to be required as conducive to justice.—*Carron Company v. Maclaren*, 5 H. L. Cas. 416.

Where there is a plain equity in favour of an injunction, at the suit of representatives of the real and personal property, who are in this country, the Court will grant it, and restrain proceedings in the Courts of a foreign country. In such a case the Court will decide upon a consideration of all the circumstances, and require parties here to take or omit such steps in a foreign Court, as the ends of justice may require. The particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded.—*Id.*

A company was chartered in *Scotland* for the manufacture of iron. Its manufactory and chief office of management were there; it had agents for the sale of the goods in different parts of *Scotland* and *England*, and it possessed real estate in both countries. A. (who was likewise a large shareholder in the company, and was possessed of real and personal property in *England* and *Scotland*) was the company's agent for the sale of goods in *London*. When he died, he made a will in the *English* form, and appointed as his executors, persons who were resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the *London* agency for the company. Probate of the will was taken out in *England*, and such of the executors as thought fit to apply to the *Scotch* Court, were, according to the *Scotch* law, confirmed in the execution of the will. An administration suit was instituted in the Court of Chancery, and the usual order for a general account of the debts and assets made. After the date of this order the Iron Company took proceedings in the *Scotch* Courts against

FOREIGN LAW—continued.

the real and personal estate of the testator in *Scotland*. Notice of an injunction at the suit of the executors, was served on the company's agent in *London*, and on the company's manager in *Scotland*; the company did not appear, and the injunction was issued. The company then moved to dissolve the injunction. No order was made:

Held (Lord *St. Leonards* dissentiente), that the injunction could not be maintained.—*Carron Company v. Maclaren*, 5 H. L. Cas. 416.

See, as to the jurisdiction of Courts of two countries over an infant who has property in both, *Stuart v. Bute* (*Marquis*), 9 H. L. Cas. 440, ante, CHANCERY, 3.

FOREIGN SOVEREIGN.

1. *Machado*, as agent for the King of *Spain*, receives from the *French Government* a sum of money, which that Government had agreed to pay to the King of *Spain* in satisfaction of the claims of certain *Spanish* subjects on *France*. *Machado* brings the money to this country, and deposits a considerable portion of it in the hands of *Hullet & Co.*, of *London*. The King of *Spain* applies to *Machado* for the money, and *Machado* refuses to deliver it, on the pretence that he is bound to pay only to such subjects of *Spain* as should be found ultimately entitled to it. Bill in the name of the King of *Spain* against *Machado* (out of the jurisdiction), and against *Hullet & Co.*, for discovery and payment of the money into Court. Demurrer to the bill for want of parties, &c., but chiefly on the ground that it had never been held that a foreign Sovereign could sue in equity in this country. Order by the Court below overruling the demurrer, and this order, affirmed by the Lords.—*Hullet v. The King of Spain*, 1 Dow & C. 169.

A foreign Sovereign has a right to sue in this country in equity as well as at law. In this case the King of *Spain* is the only party entitled to the money in the first instance.—*Id.*

2. A foreign Sovereign Prince, being declared entitled to sue in the Court

FOREIGN SOVEREIGN—continued.

of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross bill, filed against him by the defendants to his original bill:

Held, that he stands on the same footing with ordinary suitors, as to the rules and practice of the Court, and is bound, like them, to answer a cross bill personally and upon oath.—*King of Spain v. Hullet*, 1 Cl. & F. 333.

3. A foreign Sovereign (who is also a *British* subject) coming to *England*, cannot be made responsible in the Courts here for acts done by him, in his Sovereign character, in his own country.—*The Duke of Brunswick v. The King of Hanover*, 2 H. L. Cas. 1.

See *Wadsworth v. The Queen of Spain*, and *De Haber v. The Queen of Portugal*, 17 Q. B. 171; *Prioleau v. United States of America*, L. R., 2 Eq., 659; *United States of America v. Wagner*, L. R., 3 Eq., 724; L. R., 2 Ch. Ap., 582.

FRAUD. See AGREEMENT, BOND. INSURANCE, 5. SALE.

1. In 1733 a decree, obtained by fraud and collusion, and without the necessary parties, was issued by the Court of Exchequer in Equity (*Ireland*) for the sale of certain mortgaged premises, and the sale was effected in 1746 by the tenant for life to a person cognisant of the facts. In 1796 a tenant in tail, who had then come of age, challenged the proceedings by a suit in the *Irish* Court of Chancery, but in 1801 the bill was dismissed without costs. On farther hearing, the relief prayed for was granted, and on the ground of fraud, this House in 1813 affirmed the decree of the Court below.—*Gore v. Stacpoole*, 1 Dow, 18.

See *Mullins v. Townsend*, 2 Dow & C. 430; *Bandon v. Beecher*, 3 Cl. & F. 479; *Adams v. Swoorder*, 2 De G., J., & S. 44.

2. Two estates were held by A. under entails with different heirs and remaindermen. A., without disclosing this difference, obtained an order

FRAUD—continued.

for the sale of one of the estates, in order to redeem the land tax on both. The estate sold was purchased by A.'s agent, as trustee for A. On the application of those entitled in remainder to this particular estate, in a suit properly instituted for the reduction of this sale, it was ordered to be reduced. This judgment was affirmed on appeal.—*Laurie v. Laurie*, 2 Dow, 556.

3. B., F., and K., became co-partners in a joint adventure in land. A third person (Lord L.), for whom K. is factor, is anxious to purchase a part of the co-partnership land called *Hilton*, at 19,441*l.*, and applies to certain monied relations to furnish him with the means of effecting the purchase. B. is aware of the anxiety of Lord L. to purchase *Hilton*, but K. does not communicate to B. the steps taken by Lord L. with that view. F. (K. concurring) persuades B. to agree to offer the lot to Lord L. at 19,000*l.*, in order to bring him to a decision; and B. and F. offer it at that price to K., who accepts it for himself without any objection made by his co-partners; B., however, understanding the offer and acceptance to be for Lord L. Lord L. does not accept the offer at that time, and K. sells the lot at 19,000*l.* to F., without any communication with B. F. sells pieces of the lot to M. and Lord L. without any interference by B., and then sells the remainder to Lord L., at a price which makes up for the whole lot the sum of 22,311*l.*, instead of 19,000*l.* B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at 19,000*l.*, was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of these profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the defendants affirmed above, but without costs.

FRAUD—continued.

The Lord Chancellor and Lord *Redesdale* being of opinion, that although the circumstances might raise a suspicion of unfair dealing, B. by his own conduct in not interfering at all with the sales by F. of pieces of the lot to M. and Lord L., taken in connection with his conduct at the time of the offer to and acceptance by K., was precluded from the relief which he prayed.—*Bayne v. Ferguson*, 5 Dow, 151.

4. John *Ewer*, by his marriage contract, covenants that his whole property at the time of his death shall belong to the issue of the marriage. His wife died in his lifetime, leaving a daughter, an only child, who when about 21 married, and had a son. The husband proposed to go abroad to better his fortune, and J. E. (not then an affluent man) persuaded him and his wife, who were ignorant of the covenant in J. E.'s marriage settlement, to execute a deed in the nature of a post-nuptial contract, by which, in consideration of a sum of 315*l.*, they discharged him from all their claims on his property. This deed was brought to the husband and wife to execute on the eve of their departure. It was stated in the deed that J. E. paid the 315*l.* at the time of the execution of the deed, but in fact he only renounced a debt due from the son-in-law to him of 61*l.*, and gave a promissory note for 96*l.*, and thus satisfied the one-half of the sum mentioned in the deed. J. E. lived for a considerable time afterwards, grew rich, and two days before his death conveyed the bulk of his property (14,000*l.*) to trustees to build a hospital:

Held, that the post-nuptial contract must be reduced on the ground of fraud and circumvention.—*Ewen v. Bannerman*, 2 Dow & C. 74.

The trust settlement to build the hospital directed that the fund should accumulate till it should amount to *sterling*, when it should be applied to the building of a hospital, and to the maintenance of *boys* (both the spaces being left blank).

The trust settlement was ordered to be reduced, on the ground of un-

FRAUD—continued.

certainty as well as fraud.—*Evon v. Bannerman*, 2 Dow & C. 74.

See *Mullins v. Townsend*, 2 Dow & C. 430.

5. Where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in *Ireland*, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, the Court of Chancery in *Ireland*, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords.

The fraudulent sales had been made by the first tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above 35 years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem:

Held, by the Court below, and affirmed by the Lords, that he was not barred by the lapse of time.—*Bandon (Earl of) v. Becher*, 3 Cl. & F. 479.

See *Mots v. Moreau*, 13 Moo. P. C. 399; *Reg. v. Saddlers Company*, 3 E. & E. 72; 10 H. L. Cas. 404; *Adams v. Swarder*, 2 De G., J., & S. 44.

6. After a long lapse of time since the transactions complained of, there having been parties in *esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity, and in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise.—*Bowen v. Evans*, 2 H. L. Cas. 257.

See *Colyer v. Finch*, 5 H. L. Cas. 905.

7. By the deed of co-partnership of a joint-stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company.

FRAUD—continued.

A. purchased shares, and executed some of the acts required to constitute him a member of the company, but left one of these acts unexecuted:

Held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract.—*Burnes v. Pennell*, 2 H. L. Cas. 497.

A joint-stock marine insurance company had declared dividends, which it afterwards appeared were not warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares:

Held, that he could not relieve himself from his contract on account of these representations.—*Id.*

Held also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint-stock company is not, like an ordinary partnership, bound by the acts of any individual member of it. If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished for conspiracy.—*Id.*

See *Bain v. Whitehaven Railway*, 3 H. L. Cas. 1; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Carron Company v. MacLaren*, *Id.* 416; *New Brunswick Land, &c. Company v. Conybeare*, 9 H. L. Cas. 711; *Venezuelan Company v. Kisch*, L. R., 2 H. L., 99; *Oakes v. Turquand*, *Id.* 325.

8. When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality. The *onus probandi* that the end was not so attained lies on the

FRAUD—continued.

party who used the deception.—*Smith v. Kay*, 7 H. L. Cas. 750.

A security given for payment of a bill which has existence only through a fraud, cannot be made available by the supposed holder of the bill, though he may be untainted by the fraud to which it owes its origin, but he must rely on the bill alone, and can derive no benefit from the fraudulent security.—*Id.*

Representations inducing a person to enter into a particular contract, though not made at the moment the contract is actually entered into, constitute, if fraudulently made, *dolus dans locum contractui*. *Dub. Lord Wensleydale*.—*Id.*

The jurisdiction of Courts of Equity will be employed to protect infants, and is not confined to cases where there has been an abuse of a strictly fiduciary character. The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. In the former instances influence is presumed, in the latter its existence must be proved.—*Id.*

9. Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration, or irregularity in the statement of it in the deed of conveyance, is not sufficient to impeach the contract.—*Harrison v. Guest*, 8 H. L. Cas. 481.

A. was the possessor of a small property in land. *B.*, a neighbouring landowner, had formerly offered to purchase the property, but his offer had been refused. *A.* grew old, and became ill; he proposed some arrangement, and the land was conveyed to *B.* The deed truly recited an advance of money to pay off a mortgage on the land, and then it recited other money considerations. Instead of these money considerations the real agreement was, that *B.* should allow *A.* to live in a certain cottage occupied by one of *B.*'s tenants, providing him there with a bed-room and sitting-room, and attendance, and supplying him with food from his table. This deed was prepared by *B.*'s solicitor: it was sworn in evidence that *A.* had refused to have

FRAUD—continued.

another solicitor called in, and that the statements of the latter class of money considerations in the deed were only meant as a security to *A.* in case the board and lodging, &c. should not be properly provided. In a suit by persons whom, many years before, *A.* had made his devisees, to set aside the deed of conveyance:

Held, that there being no actual fraud proved (though it was charged), the irregularities in the statements contained in the deed were not sufficient to make a Court of Equity set aside the transaction.

But observations were made on the framing of deeds in such cases.—*Harrison v. Guest*, 8 H. L. Cas. 481.

10. Reports made by the directors of a company, and afterwards adopted and circulated by the company, are binding on the company as statements made by its authority.—*New Brunswick, &c. Company v. Cnybear*, 9 H. L. Cas. 711.

If such reports are afterwards shown to have been the immediate cause of a purchase of shares in the company, and to have been untrue, the company cannot retain the contract or the money thereby acquired.—*Id.*

FRAUDS, STATUTE OF. See CONTRACT, 14. MARRIAGE.

1. *Semble*, that a letter written and signed by a father, after the marriage of his daughter, admitting the terms of certain written proposals which had not been signed, was a recognition of them as his agreement, sufficiently signed by him under the Statute of Frauds.—*Hammersley v. De Beil*, 12 Cl. & F. 45.

See *Mausell v. White*, 4 H. L. Cas. 1039; *Jorden v. Money*, 5 H. L. Cas. 185; *Fisnmaurice v. Bayley*, 9 H. L. Cas. 78; *Caton v. Caton*, L. R., 2 H. L., 127.

2. A memorandum which is not a complete agreement, is not binding within the Statute of Frauds; and of an incomplete agreement there cannot be part performance.—*Thynne (Lady) v. Glengall (Earl)*, 2 H. L. Cas. 131.
- A father having agreed to settle a certain sum for the benefit of his daughter and the children of her

FRAUDS, STATUTE OF—continued.

intended marriage with Lord G., a memorandum of the terms of the settlement was, by his direction, written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instruction to prepare such settlements, but died before the same was ready for execution, having by his will given the daughter real estates and the moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement in conformity to the written memorandum :

Held, that the memorandum was not a complete agreement within the Statute of Frauds.—*Thynne (Lady) v. Glengall (Earl of)*, 2 H. L. Cas. 131.

3. If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds.—*Ridgway v. Wharton*, 6 H. L. Cas. 238.

FREIGHT. See CONTRACT. SHIP.

In all cases of insurance on ships, in which the subject is not actually annihilated, the assured claiming as for a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather such property vests in the underwriters. Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters paying for a total loss. A vessel in the course of a voyage struck upon an iceberg on the 27th of July, and was considerably injured, but reached *Liverpool*, and while in the river there grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and after the survey, namely, on the 1st of September, the owner abandoned to

FREIGHT—continued.

the underwriter on ship, and claimed as for a total loss :

Held, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo.—*Stewart v. Greenock Marine Insurance Company*, 2 H. L. Cas. 159.

A partial loss of freight may be recovered, on a declaration claiming a total loss.—*Benson v. Chapman*, 2 H. L. Cas. 696.

See *Bristowe v. Whitmore*, 9 H. L. Cas. 391.

FRENCH CLAIMS.

A., a *British* subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first *French* Revolution. The Governments of *England* and *France* entered into conventions respecting compensation to be afforded to *British* subjects. The *English* Government received all the money agreed upon between the two Governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, according to one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right :

Held, that he had no remedy except under the provisions of the statute.—*De Bode v. The Queen*, 3 H. L. Cas. 449.

GAME.

1. The right of hunting, shooting, &c., is an interest in the realty, and a grant of it is a license of a *profit à prendre*.—*Ewart v. Graham*, 7 H. L. Cas. 331.

GAME—*continued.*

2. Title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property.—*Blades v. Higgs*, 11 H. L. Cas. 621.

Game chased and killed on the land of A., is his property.—*Id.*

Therefore, where a stranger, without A.'s permission, killed coney on the land of A., and immediately took them up and carried them away, and sold them to a third person, it was held that the servants of A. were justified in taking possession of them as being the property of A.—*Id.*

Rigg v. Lonsdale, 11 Exch. 654; 1 Hurl. & N. 923, approved. Also *Sutton v. Moody*, 1 Ld. Raym. 259; Comyns, 34; 12 Mod. 144, 145. But, *per Lord Chelmsford*, as to the declaration in the latter case that "If A. starts a hare on the ground of B., and hunts it into the ground of C. and kills it there, the property is in A. the hunter;" *Quære!*—*Id.*

GAMES. See CUSTOM. PLEADING, 3.

GIFT OR LOAN.

J. F., a man of great wealth, and having no children of his own, gave an order on his bankers in October 1821, to advance to *G. M.*, his favourite nephew, "such sums of money as they might think prudent, with the opinion of *D. C.*, for the purpose of assisting him to pay in ready money for his goods." In pursuance of this order *G. M.* drew cheques for 6000*l.* and 4000*l.*, and they were duly honoured. In August 1824, *J. F.* gave the following order on his bankers: "Please to honour such cheques as Mr. *G. M.* may draw for my use," &c. In pursuance of this order also, *G. M.* drew cheques, and they were duly honoured. In April 1826, *J. F.* caused a sum of 20,000*l.* to be advanced to *G. M.*, who also had from one of *J. F.*'s tenant's wool and sheep, the price of which was,

GIFT OR LOAN—*continued.*

by agreement to which *J. F.* was a party, set off against the rent due to him from the tenant; *G. M.* further received from the partners of *J. F.*, by his direction, a quantity of indigo, and took possession of furniture and other property of *J. F.* before his death. In a suit for the administration of the estate of *J. F.*, who died intestate, a state of facts was carried in before the Master, under the usual decree for an account, charging *G. M.* as debtor to the estate for the 6000*l.*, 4000*l.*, and 20,000*l.*, and the prices of the wool, sheep, indigo, and furniture; in answer to which he insisted that all these advances in money and goods were absolute gifts to him and his family from *J. F.*, and that an admission made by him after *J. F.*'s death that the sum of 20,000*l.* was a loan, had been obtained from him fraudulently by the administrator, and he produced letters purporting to be written to him by *J. F.*, and which, if genuine, would support his answer, but they were charged to be fabricated for the purpose, and no explanation was given respecting them. The Master found all the said advances and goods and money, except the 20,000*l.*, to be gifts:

Held, by the Lords (affirming a decree allowing exceptions to that report), that *G. M.* was debtor to the intestate's estate for all the said sums and the prices of the goods.—*Mortimer v. Trevelyan*, 4 Cl. & F. 657.

GLEBE. See MANSE.

A designation, or award, of grass glebe may be made by the Presbytery, though there has been for about a century a payment of a certain sum of money in lieu of such glebe, such payment not being proved by any record of the Presbytery to have been made by a decree of the Presbytery.—*Anderson v. Thomas*, 2 Dow, 433.

Semble, in such a designation the Presbytery is not bound to take the lands nearest the church.—*Id.*

The 3 & 4 Will. 4, c. 37, s. 124, empowers the Lord Lieutenant and Privy Council in Ireland to "disappropriate, disannite, and direct any

GLEBE—*continued.*

rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishopric, bishopric, deanery, or archdeanery, dignity, prebend, or canonry, and to unite every such rectory, vicarage, tithes, or portions of tithes, to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes, and glebes, or part or parts thereof, shall, with its respective vicarage, perpetual or other curacy, form a distinct parish or benefice :"

Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory. That the word *rectory* in the statute must be applied in its widest legal sense, and therefore includes the glebe; and that an order of disappropriation of a "rectory" made by the Lord Lieutenant and Privy Council cannot be restricted to the tithe rent-charge, unless on the face of the order of disappropriation such restriction is manifested.—*Wilson v. Loveland*, 12 Cl. & F. 677.

In an order of the Lord Lieutenant and Council, made under this Act, there was a statement of the revenues of three rectories belonging to a cathedral treasurerahip. The order then went on to say, "There is a farther income belonging to the said treasurerahip, arising from demised lands, amounting to the yearly sum of 80 l. 6 s. 1 1/2 d." The glebe lands, which were not in express terms mentioned in the order, did amount to nearly the sum thus stated. A small piece of land called the Treasurer's Garden, made up the rest. After this statement of the revenues, the order went on to disappropriate "the rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the Act, but said nothing about the glebe :

Held, that the glebe lands were under this order, disappropriated from the treasurerahip.—*Id.*

GOLF. See PLEADING, 3.

GRAND JURY.

The 56 Geo. 3, c. 87, is repealed by the 1 & 2 Vict. c. 37; and the latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions in *Ireland*.—*O'Connell v. The Queen*, 11 Cl. & F. 156.

GRANT. See FISHERY. USER.

1. A grant by letters-patent of King Edward IV., dated at *Drogheda*, in the ninth year of his reign, to W., Bishop of M., and his successors, of the advowson of the rectory of K., was held to be avoided by an Act of Parliament passed at *Drogheda*, 10 Hen. 7, by which, after reciting that "intolerable oppressions and extortions over the poor innocent and true subjects within the poor land of *Ireland*, which could not be reformed without great costs, and as great part of the King's revenues of the said land had been diminished and granted to divers persons who did little service for the commonwealth," it was enacted "that there be resumed unto the King's hands all manors, lordships, castles, garrisons, fortresses, advowsons of churches, &c., whereof our said Sovereign Lord, or any of his noble progenitors, Kings of *England*, was at any time seised in fee simple or fee tail, from the last day of the reign of King Edward II.; and all feoffments, gifts in tail, grants, &c., of all and every the aforesaid honours, manors, &c., as before specified as well by Parliament as by any letters-patent under the Great Seal of *England* or *Ireland*, made to any person or persons, by whatsoever name or names they be named, from the said day be resumed, revoked, annulled, and deemed void, and of none effect in law :"

Held, that the said Act avoided the grant, and re-appended the said advowson to the manor of R., whereto it was appended before to the grant.—*Meath (Bishop) v. Winchester (Marquis)*, 4 Cl. & F. 445.

2. The Officers of State in *Scotland* are the proper parties to institute process to set aside an illegal grant of

GRANT—continued.

the property of the Crown in that country.—*The Lord Advocate v. Dun-glas (Lord)*, 9 Cl. & F. 173.

That such an action brought by the Lord Advocate in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.—*Id.*

That in such action the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*Id.*

See *Corporation of London v. The Attorney General*, 1 H. L. Cas. 440; *Smith v. Officers of State in Scotland*, 2 H. L. Cas. 807.

GUARANTIE. See BOND. FRAUD. SURETY.

1. *Per Lord Eldon (Chancellor)*: The principles of the law of Scotland, as to guarantie, are the same as those of the law of England. If one puts into the hands of another a letter, by which he engages to pledge himself for the payment of whatever sums may be advanced on the faith of that letter, and money is so advanced, he must abide by the consequences. But the guarantie may be withdrawn before it is acted on.—*Grant v. Campbell*, 6 Dow, 239.

Per Lord Eldon (Chancellor): When A. engaged to advance money for B. upon a guarantie of indemnity given by C., and A., before advancing any money, had notice of an agreement executed, or to be executed, between B. and C., relative to the indemnity; this imposed upon A. the duty of inquiring into the terms of the agreement, and if he afterwards advanced his money without such inquiry, he had only such indemnity as the agreement provides.—*Id.* 253.

2. A partnership composed of three persons, A., B., and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond two estates, held by A., were

GUARANTIE—continued.

specially named as part securities for these advances. A. died:

Held, that by his death the partnership was dissolved, and the security, so far as his estates were concerned, was no farther continued; no arrangements between the surviving parties, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting the security.—*Bank of Scotland v. Christie*, 8 Cl. & F. 214.

After the death of A., the bank continued as before its dealings with the partnership, then constituted by B. and C., and at a certain period payments to the bank balanced the debt due to it at the time of A.'s death:

Held, that the separate liability of A.'s estates was thereby discharged.—*Id.*

B., the son and heir of A., within one year after his father's death, gave to the bank a heritable bond over his father's estates, for securing payment of advances to be made by the bank:

Held, that this was a bond for his own, and not for his father's debts, and was consequently void, under the Scotch Act of 1661, as a bond granted by the heir within one year of the ancestor's death.—*Id.*

3. A., by a trust settlement, gave to his son "a like sum of 5000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced, or may still advance, for him, to enable him to carry on his business." A. entered into a guarantie for 2000*l.* for the firm of which his son was a partner. A. was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend:

Held, that this was an advance to the son which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5000*l.*, after deducting the sum thus advanced.—*Berry v. Morse*, 1 H. L. Cas. 71.

HEADINGS OF CLAUSES.

The Lands Clauses Consolidation Act, 1845, is divided into different subjects by headings, which are accompanied by corresponding words in the margin. Thus, there is a division marked in the margin by the words "Intersected lands." In the body of the statute is a line containing these words as a heading: "And with respect to small portions of intersected land, be it enacted, as follows." Then come two sections, the first of which (the 93rd) begins thus: "If any lands not being situate in a town," &c. The second of the two sections (the 94th) begins "If any *such* land shall be so cut through and divided," &c. :

Held, that the word *such* in the 94th section is not confined to "lands not being situate in a town," as described in the 93rd section, but applies to the words in the general heading, "small portions of intersected land."

—*Eastern Counties Railway Company v. Marriage*, 9 H. L. Cas. 32.

HEIR AT LAW. See LEGITIM.

1. Where the price or any part of an inheritable (real) estate remains unpaid, and is made by the conveyance a burden on the estate till paid, the price of that part of which remains unpaid, and is so made a burden on the estate, does not go to the executor or administrator, but remains heritable, and descends to the heir at law. — *Mackenzie v. Anderson*, 2 Dow & C. 60.
2. An heir of line taking an entailed estate upon his father's death, cannot by the law of Scotland claim his share of his father's personalty as next of kin, without first collating the entailed estate, though the entail was not created by his father, but by a more remote ancestor. — *Anstruther v. Anstruther*, 4 Cl. & F. 33.
3. A. executed a disposition, by which, in the event of his predeceasing his parents without leaving heirs of his body, he gave all his estate, heritable and moveable, then belonging, or which should belong, to him at his death, to his parents and the longest liver of them, and after the death of the longest liver, then to such

HEIR AT LAW—continued.

person and for such uses as he himself might appoint by deed during his life, and even on death-bed; and in case he should die without executing such deed, then to such person and for such uses as his parents should appoint. His parents predeceased A., having, with his consent, executed a mutual trust disposition and settlement, in favour of trustees therein named. A. afterwards executed a trust disposition and settlement, giving all his estate to trustees therein named; declaring the uses, and revoking all former settlements as far as they interfered with it; and he died on the same day, without heirs of his body:

Held, that A.'s said first deed did not preclude his heir at law from challenging and reducing the death-bed deed. — *Gordon v. Clyns*, 6 Cl. & F. 539.

4. A person seeking the benefit of a dealing with an heir expectant, for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables. — *Aldbrough (Earl) v. Trye*, 7 Cl. & F. 436.

The rule that a fair price is to be given, is sufficient protection to an heir expectant or reversioner; but the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all. — *Id.*

A sale by public auction, is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth. — *Id.*

See *Lewis v. Hillman*, 3 H. L. Cas. 607.

5. A trust disposition and deed of settlement conveyed generally the trustor's whole heritage to trustees, containing no precept of sasine, but surrogating the trustees in place of the trustor, and binding him and his heirs to complete titles and convey to the trustees; he reserving to himself power to execute entails of parts of his fee simple lands, but declaring them to be suspended during the

HEIR AT LAW—*continued*.

continuance of the trust, except as to rights of patronage; and he executed such entails, with precepts of sasine. After his death, the trustees named in the deed having declined to accept the trusts, the first heiress of entail made up titles, and was duly infeft heiress of entail. Trustees afterwards appointed by the Court, with her consent, and with all the powers given to those who declined to act, raised an action of constitution and declarator against the heiress of line, and called the heiress of entail as defender:

Held, by the Lords (affirming the decree of the Court of Session), that it was not competent for the heiress of entail to oppose the completion of feudal titles, by the trustees, to the whole of the lands comprised in the trust disposition; and that they (provided they were duly appointed) were entitled to a conveyance of the whole lands, according to the intent of the trust disposition, but without prejudice to the rights of any party. —*Preston v. Melville*, 8 Cl. & F. 16.

6. *E. C.*, by his will, dated in 1786, gave his estate of *T.* to certain persons for life, and after their decease to his kinsman *J. C.*, or his male heir; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of his uncle *R. C.*'s family, yielding and paying to such of the daughters of the aforesaid *R. C.* which should be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates. The testator died in 1787; *R. C.* died six years before, having left five daughters only, all married. The eldest had several daughters but no son; each of the others had sons; all these persons were known to the testator. The eldest daughter of *R. C.* died in 1799, having no son, but leaving a daughter who had a son born in 1795, both still living. The second died in November 1782, having had two sons, one born in 1763, who died in 1817; the second born in 1770, still living. The third died in 1813, leaving two sons, one born in 1771, who died in 1813; the other born in 1773, still living. The fourth died in 1804, leaving a son

HEIR AT LAW—*continued*.

born in 1768, who died in 1819. The fifth, still living, had a son born in 1772, who is still living. The life estate in the devised lands expired in July 1820:

Held, 1. That the remainder devised to the first male heir of the branch of *R. C.*'s family was a contingent remainder in fee simple.

2. That such remainder, if once vested, could not become divested, so as to admit another person in preference to him in whom it had vested.

3. That the said remainder did not vest in *R. C.*'s second daughter's son, in preference to his first daughter's grandson. — *Doe d. Winter v. Perratt*, 9 Cl. & F. 606.

Quare, as between the titles of the grandson of *R. C.*'s eldest daughter, and the son of *R. C.*'s fourth daughter? Lord *Brougham* was of opinion, supported by five judges, —1, that the words "first male heir" were not used by the testator to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor in a technical sense; 2, that the said remainder first vested in interest, on the death of *R. C.*'s fourth daughter in 1804, in her son. Lord *Cottenham*, supported by six judges, was of opinion, —1, that the words "first male heir" were used to denote a person of whom an ancestor might be living; 2, that the said remainder did not first vest in interest in *R. C.*'s fourth daughter's son. His Lordship did not say when or in whom it vested. Two of these judges said it vested in the first daughter's grandson, on that daughter's death in 1799; two others said it then vested in *R. C.*'s second daughter's son; and the remaining two said that the will was in that respect void for uncertainty. —*Id.*

See *Thellusson v. Roberts*, 7 H. L. Cas. 429.

7. There is no absolute rule in a Court of Equity requiring that Court, as of course, to grant a second trial in an issue of *deviseavit vel non*, when the judge in equity is satisfied that no new light could be thrown on the subject by a farther investigation. — *McGregor v. Topham*, 3 H. L. Cas. 132.

HEIR AT LAW—*continued*.

Though there may be an outstanding legal estate, which compels the heir at law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory.—*McGregor v. Topham*, 3 H. L. Cas. 132.

In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined.—*Id.*

8. A bill, to establish a will against an heir at law, may be maintained at the suit of a mere legal devisee, not charged with any trust or duty under the will.—*Colclough v. Boyse*, 6 H. L. Cas. 1.

HERITORS. See CHURCH. MANSE. PRESBYTERY.

HIGHWAY.

1. By the common law, declared and defined by the statute 22 Hen. 8, c. 15, the inhabitants of a county liable to the repair of a public bridge are also liable to the repair of the highway at each end thereof, to the extent of 300 feet; and cannot exonerate themselves therefrom except by showing that some one else is bound by prescription or tenure to repair the same.—*Inhabitants of West Riding of Yorkshire v. Rex*, 2 Dow, 1.

See *Reg. v. Mayor of Lincoln*, 8 Ad. & El. 65. As to railway bridges, see *North Staffordshire Railway v. Dale*, 8 El. & Bl. 836; *Reg. v. Birmingham and Gloucester Railway*, 2 Q. B. 47; *Newcastle Roads v. North Staffordshire Railway*, 5 H. & N. 160; *London and North Western Railway v. Skerton*, 5 B. & S. 559.

2. A common staircase is in the nature of a highway, so as to support an action for damages on account of any particular injury that may arise to an individual from not properly securing any dangerous opening that may be made thereon.—*Mylne v. Smith*, 2 Dow, 390.

HOLDERNESS DRAINING ACT.

There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act under which a rate is made, either expressly or implicitly, prohibits such rate from being retrospective. The 2 Will. 4, c. 50 (public local), for draining the lands of *Holderness*, in the East Riding of the county of *York*, contains no prohibition against a retrospective rate. The Commissioner under that Act borrowed money (on which interest became due), for the purposes of the works directed by the Act:

Held, that a rate made to pay off the debt thus incurred, was, under the provisions of that Act, a valid rate.—*Harrison v. Stickney*, 2 H. L. Cas. 108.

HOSPITAL. See CHARITY.

A trust settlement for the founding of a hospital directed that the hospital should be governed according to such rules and regulations as *J. E.* (the intending founder) should, by a separate deed, appoint, or, failing any such appointment, by the rules and regulations of an existing hospital specifically referred to in the settlement. No appointment was made:

Held, that these directions were sufficiently certain, and would be operative if the deed had been good in other respects.—*Ewen v. Bannerman*, 2 Dow & C. 74.

HOUSE OF LORDS. See APPEAL. JUDGES. PRACTICE.

1. A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament.—*Tommey v. White*, 3 H. L. Cas. 49.

This House is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the judges.—*Bright v. Hutton*, 3 H. L. Cas. 341.

Quære, whether this House, like any other court of justice, may, in a subsequent case, overrule a previous decision of its own?—*Id.*

2. The judges were required to answer a question put by the House. One

HOUSE OF LORDS—*continued*.

of them differed from the rest. The opinions of the majority were stated by one of their number, and, in the statement, the principle on which the dissentient judge formed his opinion was set forth to his satisfaction. The House did not require him to state his reasons at length.—*Salmon v. Webb*, 3 H. L. Cas. 510.

3. An application to advance an appeal for hearing must be made to the Appeal Committee, and not to the House.—*Birch v. Joy*, 3 H. L. Cas. 567.
4. The Lords allowed the opinion of a learned judge, who had been present at the hearing of the cause, but who was unable to attend when the judge's opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course.—*Stephenson v. Higginson*, 3 H. L. Cas. 638.
5. A decision of the House of Lords is as binding upon the House itself as upon any inferior Court. (*Per Lord Campbell*, Lord Chancellor; *dub. Lord Kingsdown*.)—*The Attorney General v. The Dean, &c. of Windsor*, 8 H. L. Cas. 369.

And where there is an equal division of opinion among the Lords, and, in consequence, the judgment of the Court below stands, the result is the same as to authority as if the Lords had been unanimous in their judgment. (*Per Lord Campbell*, Lord Chancellor.)—*Id.*

See, to the same effect, *Lord Campbell* (Lord Chancellor), in *Beamish v. Beamish*, 9 H. L. Cas. 274.

HUNTING. *See* GAME.HUSBAND AND WIFE. *See* ATTORNEY AND CLIENT, 12. DIVORCE. LEGITIMACY.

1. A contract between a husband and wife, duly executed in point of form, may, by the law of *Scotland*, be valid as against all the world, if the consideration for it is onerous, (real value given for it), but if purely gratuitous, it may be revoked by him.—*Hepburn v. Brown and Others*, 2 Dow, 342.

HUSBAND AND WIFE—*continued*.

2. By a marriage contract, lands, on failure of heirs male of the marriage, were settled on the heirs female, and the heirs male of their bodies. After some years of marriage, there having till then been no child, the wife was delivered of a female child. The husband had before its birth instituted a suit for divorce on the ground of adultery. Some time after the birth he obtained a decree for a divorce. While this female child was still a minor she married, had a son, and died before her presumed father; but previously to her death she and her husband consented (and the consent was made to assume the form of an award between contesting parties) to take a sum of money in discharge of any claims she might have under her mother's settlement. The Court of Session had, in a suit by the son, held this arrangement valid, but the cause was remitted, with instruction to take the opinions of all the judges on the point.—*Routledge v. Carruthers*, 4 Dow, 392.

Quare, whether, as the daughter did not live to be the heir, her consent could bind her son?—*Id.*

3. Where an estate is vested in a wife in fee, and on her second marriage she joins with her second husband in a mortgage, reserving the equity of redemption to him and his heirs, if there is no other evidence of intention to make a new settlement of the estate, or to go beyond the purposes recited in the deed, and if the recital shows that the instrument is framed for other purposes, the husband has the equity of redemption as he before had the legal estate, namely, *jure uxoris* only.—*Ruscombe v. Hare*, 6 Dow, 1.
4. *H.* had an estate on which he had made two mortgages, at 4½ per cent. each. He devised the estate to his wife in fee, and died. There was one son of this marriage. A year afterwards she married *B.*, and joined her second husband in a mortgage, the object of which was to raise money to pay off the previous mortgages. In the last mortgage, which was at 5 per cent., the equity of

HUSBAND AND WIFE—*continued*.

redemption was expressly reserved to *B.*, but there was no fresh settlement of the estate. After the death of the wife of *B.*, and of *B.*, her son by *H.* filed a bill to redeem :

Held, that a decree in his favour must be affirmed ; and as *B.* on his wife's death became tenant for life by the curtesy, he was bound to keep down the interest from that time ; and the arrear of interest was ordered to be converted into principal from the death of the wife, and to be considered a charge on the estate.—*Ruscombe v. Hare*, 6 Dow, 1.

5. Deeds of separation in 1817 and 1818, between Lord and Lady *W.* By the deed of 1817 it is provided that the parties shall continue to reside together, and cohabit as husband and wife, but that on the renewal of dissensions the separation shall immediately take effect. Disputes continue, and the deed of 1818 is executed, which provides for an immediate separation ; but Lady *W.* is prevailed upon to allow her husband to occupy apartments in the same house with her till he can procure an appointment abroad. They accordingly live, dine, and visit together for about a year after the execution of the deed, but without cohabitation as husband and wife. Bill by Lord *W.* to set aside the deeds, chiefly on the ground of their being contrary to public policy ; and the deed of 1817 is declared to be null and void, reserving the rights of a child of the marriage, and no appeal by Lady *W.* against the decree. As to the deed of 1818, the bill is retained for twelve months in the usual way, to give the parties an opportunity to try the question of its validity at law. The parties do not avail themselves of this opportunity, but Lord *W.* appeals against the decree to the House of Lords. The judgment of the Court below affirmed, enlarging the time of retaining the bill, so as to enable the parties still to try the question at law.

The Lord Chancellor and Lord *Eldon* being clearly of opinion that the deed of 1817, providing for a future separation could not be supported,

HUSBAND AND WIFE—*continued*.

and the Lord Chancellor being decidedly of opinion that, under the circumstances of the parties living together, although without cohabitation as husband and wife, the deed of 1818 could not be sustained ; and Lord *Eldon* being of the same opinion, but more cautiously and with an anxiety that the question should still be tried at law, with the record put into such a shape that it might be again brought by writ of error before the House for final adjudication. — *Westmeath v. Westmeath*, 1 Dow & C. 519.

See *Wilson v. Wilson*, 5 H. L. Cas. 40.

6. A deed of separation between a husband and his wife having been drawn up, but not executed by the husband :

Held, that his executing such deed was a legal consideration for an agreement by a third person to pay a sum of money to the husband, towards the discharge of certain debts and expenses for which the husband was solely liable.—*Jones v. Waite*, 9 Cl. & F. 101.

7. The rule of law in *Scotland*, requiring the concurrence of the husband in his wife's deed, cannot be dispensed with by proof that he was absent abroad at the time of the execution of the deed, unless that absence is shown to be more than merely temporary.—*Rennie v. Ritchie*, 12 Cl. & F. 204.

A testator in *Scotland* gave all his property to trustees ; first, to pay his debts ; secondly, to pay Mrs. *R.* (a married woman) so much of the annual proceeds as they might deem necessary for the support of her and family during life, declaring the same to be alimentary and exclusive of her husband, and not to be attachable, nor assignable, nor subject to any deeds or debts of her and her husband. The acting trustee, with consent of Mrs. *R.*, assigned to her alimentary creditor the rents of the trust property ; first, to pay debts affecting it ; secondly, to pay part of the rents to Mrs. *R.* for aliment ; thirdly, to apply the residue in pay-

HUSBAND AND WIFE—continued.

ment of the debts due to the assignee :

Held, that the assignment was void on three grounds, viz. :—

1. It was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment.

2. The rule of law in *Scotland*, requiring the concurrence of the husband in his wife's deed, could not be dispensed with by his absence abroad at the time for a temporary purpose.

3. The assignment was void, as it violated the express prohibition against alienation ; and in this respect the law in *Scotland* is the same as in *England*.—*Rennie v. Ritchie*, 12 Cl. & F. 204.

8. Husband separated from his wife for many years without making any provision for her maintenance from his ample means :

Held, not to be entitled to a divorce.—*Simmon's Case*, 12 Cl. & F. 339.

See *Gipps v. Gipps*, 11 H. L. Cas. 1.

9. The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property ; and the Court, in decreeing specific performance of such articles, will not inquire into the cause of the separation.—*Wilson v. Wilson*, 1 H. L. Cas. 538.

Stopping a suit in the Ecclesiastical Court for nullity of marriage on the ground of impotency of the husband, is a good and sufficient consideration to him for agreeing to articles of separation ; and so is a covenant by a third party to pay the husband's debts.—*Id.*

10. A suit for nullity of marriage had been instituted by the wife against her husband ; an arrangement for a deed of separation was proposed in order to stop it. An agreement was entered into by which the property of the parties was regulated, and by which their conduct in relation to each other was to be guided. One

HUSBAND AND WIFE—continued.

of the articles of this agreement stipulated that the husband should " permit the wife to live separate and apart from him, as if she were unmarried, without any molestation, interference, or annoyance whatsoever by or on the part of," the husband. By another article, it was declared that if he performed the covenants, &c., " he, his heirs, executors, &c., and their estates and effects, shall be indemnified from all the present debts and liabilities of the said *John*" (the husband), " by the joint and several covenant of" the trustees for the wife. A deed was to be drawn up in conformity with these articles, and on mutual execution of the deed, the suit for nullity was to be withdrawn. On a bill by the wife to compel the husband specifically to perform this agreement, the Vice Chancellor made an order referring it to the Master to approve of a proper deed to carry its provisions into effect. This order was confirmed on appeal to this House. Pending the appeal, the Master approved of a deed containing a covenant by the husband not to institute any suit in the Ecclesiastical Court for restitution of conjugal rights, and another in which the trustees of the wife agreed to indemnify the husband " against the present and future debts of *Mary*," the wife. Exceptions to this deed taken by the husband were overruled by the Vice Chancellor, whose decision was affirmed by the Lord Chancellor :

Held, that after a previous judgment of this House, affirming the order which referred the agreement to the Master as the basis for a deed of separation between these parties, the subsequent order approving of the deed as drawn by the Master must be supported.—*Wilson v. Wilson*, 5 H. L. Cas. 40.

But *quære*, whether as a rule of equity the Court could enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights, though undoubtedly it could enforce stipulations as to an arrangement of property, and as to forbearance from personal molestation ?—*Id.*

HUSBAND AND WIFE—continued.

Held also, that the Court was fully at liberty to examine the articles of agreement, and on finding in them a stipulation as to payment of debts, inconsistent with the rest of the articles, and insensible or absurd, to authorise the introduction into the deed of a covenant which would carry into effect the real intentions of the parties.—*Wilson v. Wilson*, 5 H. L. Cas. 40.

11. A husband cannot assign his wife's reversionary interest in leaseholds, if that interest was of such a nature that it could not possibly vest in the wife in possession during the coverture. Judgment of the Court below affirmed without argument.—*Day v. Duberly*, 5 H. L. Cas. 388.

IMPERTINENCE.

An information filed by the Attorney General at the relation of *A.* and *B.*, praying for the Crown the benefit of a judgment in outlawry against *C.*, and that a deed executed by *C.*, conveying his property to trustees, might be set aside as fraudulent and void as against the Crown, contained short statements, showing the interest of the relators, and that the motives for the deed were to defraud *C.*'s creditors:

Held, that these statements were not impertinent. Although it is not necessary that a relator in an information should have an interest in the subject of the suit, yet a statement showing his interest is not impertinent, as in the event of the suit failing, the costs may be more easily apportioned.—*Richards v. The Attorney General*, 12 Cl. & F. 30.

INADEQUACY OF PRICE. See CONTRACT, 5.**INCUMBERED ESTATES COURT.**

1. A mortgage given by *B.* in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed dated in 1823, executed by *A.* and *B.*, for the settlement of certain family estates, and for the payment of some of *A.*'s debts, and recited that in that deed

INCUMBERED ESTATES COURT—continued.

a sum of 3200 *l.* was due to *D.*, as trustee for an infirmary, on a judgment against *A.* and *B.*, that that money, with interest, had been paid off, and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments at the suit of *D.*, against *A.* and against *B.*, dated in 1810 and 1812, but a warrant of attorney given by *D.* in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgagee caused satisfaction to be entered on the roll as to the separate judgments of 1810 and 1812, but made no farther inquiries:

Held, that as the mortgage itself had recited a joint judgment for a specific sum, the mortgagee had been guilty of negligence in not looking farther into the matter, and must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823.—*Montefiore v. Browne*, 7 H. L. Cas. 241.

The Incumbered Estates Court, in a case where the rights of parties are under adjudication in the Court of Chancery, is ancillary to Chancery, and though it has ordered a sale of estates, it may delay the distribution of the fund obtained by such sale until Chancery has adjudicated on a claim presented to its notice.—*Id.*

2. A conveyance made by the Commissioners of the Court for the Sale of Incumbered Estates in *Ireland* is, under the 27th section of the 12 & 13 *Vict.* c. 77, "effectual to pass the fee simple discharged of all former estates," subject only to "such tenancies, leases, &c. as shall be expressed therein." Where such a conveyance is duly executed by the Commissioners, it becomes under the 49th section conclusive evidence that everything required by the Act to be done has been rightly done.—*Rorke v. Errington*, 7 H. L. Cas. 617.

An application was made to the Com-

INCUMBERED ESTATES COURT—*continued.*

missioners for the Sale of Incumbered Estates in *Ireland* to direct the sale of an estate, the property of *H. R.* held a lease of part of this estate. A paper called "A Rental," &c. was, under the 23rd section of the statute, prepared and issued by the Commissioners for the purpose of informing everybody what was to be sold, in which the existence and validity of the lease were distinctly recognised, and the proper notices were given in conformity with the Rental. *E.* became the purchaser of part of the estate, and in the conveyance made under the 27th section, and duly executed by the Commissioners, there was, by mistake, introduced a description, accompanied by a map, also erroneously drawn, of the land conveyed, which was the land actually held under the lease to *R.*, but that lease itself was not mentioned. In ejectment by *E.* against *R.* for this land :

Held, that evidence to impeach the conveyance was not properly admitted ; that the question founded on that evidence whether *E.* had purchased subject to the lease to *R.* was improperly submitted to the jury ; that under the 27th section the land must be taken to have passed by the conveyance, subject only to such leases as were therein expressed ; and that the 49th section rendered the conveyance conclusive as to all acts, consents, &c. required, having been duly performed and given.—*Rorke v. Errington*, 7 H. L. Cas. 617.

INCUMBRANCER.

1. *D.*, by indenture in 1799, demised all his estates in *Ireland* of which he was seised for life, to trustees for 99 years, on trust to pay him an annuity of 10,000 *l.*, and to apply the residue of the rents and profits in payment of his debts. He soon after received the rents to his own use, excluding the trustees' receiver ; and in 1819 he joined his eldest son *B.*, the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees, among other trusts, to pay *B.* two annuities of

INCUMBRANCER—*continued.*

5000 *l.* and 1000 *l.* during *D.*'s life, with power to *D.* to charge the estates with 217,000 *l.*, and power to *B.* to charge them with 100,000 *l.*, to be raised after *D.*'s death. *B.* assigned his annuities and charge of 100,000 *l.* to *W.* to secure the repayment of monies advanced. In 1835, *W.* filed a bill in *Ireland* against *D.* and *B.*, and others, for enforcing these securities. Some of *D.*'s creditors, who in a suit instituted in 1828, had obtained the benefit of a suit pending in *England* against him, and the trustees of the deed of 1799, for carrying the trusts thereof into execution, and the appointment of a receiver over the trust estates, being made defendants to *W.*'s bill, claimed by their answer to be first incumbrancers on *D.*'s annuity of 10,000 *l.*, to the amount of the rents received by him above that sum, in breach of the trust of the deed of 1799 :

Held, that as the creditors of *D.*, in their suit, never sought to attach his annuity before he granted the annuities out of it to *B.*, but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, *B.* being no party to them, was by the deed of 1822, a purchaser for valuable consideration, without notice ; that his two annuities were well charged on *D.*'s annuity of 10,000 *l.*, and *W.*, as *B.*'s assignee, was a prior incumbrancer on it.—*Houlditch v. Wallace*, 5 Cl. & F. 629.

2. Where a tenant for life of an estate subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainder-man any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. *Diss. Lords Cranworth and Wensleydale*, who held that there is no such presumption, especially when

INCUMBRANCER—continued.

the payment is made under force of a personal obligation to pay.—*Kensington (Lord) v. Bouverie*, 7 H. L. Cas. 557.

If the tenant for life is himself the person entitled to the benefit of the charge, and has mortgaged it, and his mortgagees have regularly been paid the interest on the mortgage debt, they are in no better situation than the personal representatives.—*Id.*

INDEMNITY.

1. Partners in a licensed distillery convicted of a breach of the revenue laws, consented to a mitigated penalty. *Semble*, that a partner who was not a participator in the delict, was legally entitled to indemnity from those who were, although he consented to the penalty.—*Campbell v. Campbell*, 7 Cl. & F. 166.
2. *Semble*, that, in the Courts of Scotland, as in England, one partner of a dissolved company has no title to sue, in his own name, another partner or stranger to the company, in respect of advances made by the company.—*Stewart v. Gibson*, 7 Cl. & F. 707.

INDICTMENT. See PLEADING. PRACTICE.

1. An indictment may be maintained against a corporation which had accepted a royal grant of a pier, &c., for not repairing the same in accordance with the words of the grant.—*Mayor of Lyme Regis v. Henley*, 2 Cl. & F. 331.
2. An indictment containing several counts, under each of which the punishment may differ from that under any other count, will not support a general judgment for one punishment.—*O'Connell v. The Queen*, 11 Cl. & F. 155.
3. *Semble*, that an indictment will lie against the directors of a company who have wilfully published false statements of the affairs of the company under such circumstances as show a fraudulent intent to deceive.—*Burnes v. Pennell*, 2 H. L. Cas. 497.

See *New Brunswick, &c. Company v. Conybeare*, 9 H. L. Cas. 711; *Venezuelan Company v. Kisch*, L. R., 2 H. L., 99.

INFANT. See CHANCERY. JURISDICTION. LANDLORD AND TENANT, 1.

1. An order directing an issue, "with the consent of all parties in the cause," is erroneous, so far as it purports to be with the consent of an infant party.

Quære, whether if the infant gave consent, he is bound by it? But if the order for the issue was a right order to be made if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not; especially as he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defence.—*Malone v. Malone*, 8 Cl. & F. 179.

Quære, whether it is clear on the authorities, that an infant defendant in a case such as this, is entitled, after coming of age, to put in a new answer, and make a new defence?—*Id.*

2. A lease of lands in Ireland containing a covenant for perpetual renewal, had been executed there in 1746. Several renewals, sometimes voluntary, sometimes compulsory, had been granted between that period and 1845, when the owner in fee disputed his liability to renew. Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January 1746:

Per Lord St. Leonards: That order was authorised by the Irish statute 11 Anne, c. 3.—*Sadleir v. Bigge*, 4 H. L. Cas. 435.

3. An order in Chancery, on petition, constituting a guardian to an infant, makes that infant a ward of Court.—*Stuart v. Bute (Marquis)*, 9 H. L. Cas. 440.

In cases relating to the care of infants, the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise. On this subject there ought to be a perfect reciprocity of action between the Courts of England and Scotland, although as to judicial jurisdiction the two countries are to each other independent foreign countries.—*Id.*

INFERIOR COURT. *See* PRACTICE.INFLUENCE (UNDUE). *See* PLEADING. PRACTICE.

1. Where undue influence is exercised over the mind of a testator in making his will, the provisions in favour of the person exercising the undue influence are void, but the will may be good in other respects. So that a will may be good as to one part, and bad as to another.—*Trimleston (Lord) v. D'Alton*, 1 Dow & C. 85.

2. A master, in order to make a provision for a confidential clerk, after his own decease, insures his life for 3000*l.*, he paying two-thirds of the premium, and the clerk one-third, and assigns the policy to the clerk. The clerk has a liberal salary, independent of this bounty; the master dies, and in his will is found a letter, stating that the assignment had been procured from him by undue influence on the part of the clerk, and evidence is given of declarations by the clerk that he had it in his power to ruin the credit of the house, by the manner in which he kept the accounts:

Held, that the assignment, as to two-thirds of the policy for which the master had paid the premium, was fraudulent and void; *et per* Lord Lyndhurst (Ch.), "the object of an issue from equity is attained when the conscience of the equity judge is satisfied that at the trial justice has been upon the whole substantially done."—*Collins v. Hare*, 1 Dow & C. 139.

3. An *Irish* barrister becoming acquainted with the affairs of a widow lady, who had large expectations from her aunt, acquired her confidence, and persuaded her to give him a deed of gift of a third of the aunt's property. When that property came into possession he persuaded her to transfer to him one-half of it for himself, and to place the other half under his management. He made various misrepresentations to her as to her property and her family, and prevailed on her to make a release to him. She afterwards called for an account, which he refused to render.

INFLUENCE (UNDUE)—*continued*.

She offered him a full discharge if he would pay her two-thirds of her property, which she calculated at 21,000*l.* He refused. On a bill in equity, the deed of gift and release were set aside as obtained by fraud, and undue influence and misrepresentation, and he was ordered to refund. Order confirmed on appeal.—*Maccabe v. Hussey*, 2 Dow & C. 440.

4. Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose.—*Boyse v. Rossborough*, 6 H. L. Cas. 2.

In order to set aside the will of a person of sound mind, it must be shown that the circumstances under which it was executed, are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shown to have been exercised in relation to the will itself, and not merely to other transactions.—*Id.*

INFORMATION. *See* CHARITY. CHANCERY. IMPERTINENCE.

If a charity is entitled to a particular sum as a first charge on an estate given to certain persons, and the estate is amply sufficient to secure payment of that sum, the fact that a portion of the estate has been lost by the alleged negligence of the donees of the estate, will not of itself justify an information on behalf of the charity against such donees.—*Mayor, &c. of Southmolton v. The Attorney General*, 5 H. L. Cas. 1.

Where a portion of an estate held under such circumstances was charged to have been improperly sold, the purchasers must be included as parties in any such information.—*Id.*

Where such portion consisted of land held upon a renewable lease, and the lessors were entitled to refuse a renewal, and the bargain was in fact

INFORMATION—*continued.*

made with them before the period for renewal arrived, such bargain, made under such circumstances, does not afford matter of complaint against the donees of the estate.—*Mayor, &c. of Southmolton v. The Attorney General*, 5 H. L. Cas. 1.

INQUIRY BEFORE MASTER.

A., being tenant in tail of large estates expectant on the death of his father, in consideration of 6000*l.* and 10,000*l.* advanced to him by *O.*, charged the estates with 12,000*l.*, and 20,000*l.* to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43; and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities; and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post obit* securities, and no consideration for the annuity; and at the hearing he gave evidence that the consideration for the two sums of 12,000*l.* and 20,000*l.* was not the full value, according to the tables and calculations of actuaries. *O.* gave no evidence:

Held, that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of *A.* and of his father, and to the circumstances of the estates, and *A.*'s interest in them.—*Aldbrough (Earl) v. Trye*, 7 Cl. & F. 436.

See *Lewis v. Hillman*, 3 H. L. Cas. 607.

INQUISITION.

- An inquisition to assess compensation under a private Act of Parliament, must state the facts necessary to raise the jurisdiction; but it will

INQUISITION—*continued.*

not be defective for not stating a fact, which is necessarily implied by those that are stated.—*Taylor v. Clemson*, 11 Cl. & F. 610.

INSANITY.

In an action brought in 1808, to reduce certain deeds executed by *M.* between 1782 and 1799, on the ground of his insanity, contradictory evidence on that point was given, and ultimately the House held the deeds to be validly executed. The rules declared applicable to such a case were stated to be, that supposing the general sanity of *M.* to be disproved, supposing him to be weak or even insane, if he was sane at the time of executing the deeds, that was sufficient to support them; that the distance of time between the period of their execution and the time when they were challenged was a material consideration, and that *M.* here having, during a part of his life, sold some and mortgaged other portions of the property affected by these deeds, which sales and mortgages had never been questioned, that circumstance was also to be considered, since if deeds executed by him had been bad as titles they could not have been good as securities.—*Towart v. Sellars*, 5 Dow, 231.

See *Tatham v. Wright*, 2 Russ. & Myl. 22, and also 5 Cl. & F. 670; *Greenslade v. Dare*, 20 Beav. 284.

Semble, that notwithstanding a party accused did an act, which was in itself criminal, under the influence of insane delusion, with a view of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law.—*Macnaghten's Case*, 10 Cl. & F. 200.

That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until

INSANITY—continued.

the contrary be proved to their satisfaction ; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.—*Macnaghten's Case*, 10 Cl. & F. 200.

That a party labouring under a partial delusion must be considered in the same situation as to responsibility, as if the facts in respect to whether delusions exist, were real.—*Id.*

That where an accused person is supposed to be insane, a medical man who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.—*Id.*

INSOLVENT. See ASSIGNMENT. BANKRUPT.

An insolvent debtor has not such an interest in property assigned under the Insolvent Acts as to entitle him to enter into any litigation respecting it.—*Rochford v. Battersby*, 2 H. L. Cas. 388.

See *Beckham v. Drake*, 2 H. L. Cas. 579; *Galbraith v. Cooper*, 8 H. L. Cas. 315; *Eyre v. McDowell*, 9 H. L. Cas. 619.

INSPECTION OF DOCUMENTS.

L. claimed to be lawful owner of divers goods and chattels in the visible user and enjoyment of the Duke of *M.*, at his family mansion. *N.*, a judgment creditor of the Duke, filed a bill against him and *L.*, charging that bills of sale and assignments of the said goods and chattels were executed by the Duke to *L.* without consideration, and that they were void as against *N.*, and praying a declaration to that effect, and offering to pay what, if anything, should be found due to *L.* on the security of the said goods. *L.*, by his answer, admitted the bills of sale and assignments to be in his possession, and said they were

INSPECTION OF DOCUMENTS—continued.

executed to him for full consideration, and that the Duke had only the permissive, not the absolute, use of the goods; and on a further answer, he claimed to have an equitable lien on them for money advanced, and he had set forth, in a schedule abstracts, of the bills of sale, &c. :

Held, by the Lords (affirming an order made by the Court below before hearing), that *N.* was entitled to inspection of the bills of sale and assignments, on the grounds, first, that these instruments were only a mortgage security, and secondly, that *N.* had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay to *L.* on redeeming the mortgage.—*Latimer v. Neale*, 4 Cl. & F. 570.

INSURANCE. See EMBARGO. FRAUD. MISREPRESENTATION. SHIP.

1. *Seaworthiness*.—A ship was described in a charterparty as "completely fitted and found," and as capable of carrying iron or weighty commodity. The freighter became the insurer. In fact the vessel, originally of 80 tons burden, had been made, by being lengthened, capable of carrying 113 tons, but the new parts of the vessel were not fastened with knees. The vessel went from Scotland to St. Petersburg, and was lost on the return voyage, though it did not appear that the want of knees had been the direct cause of the loss :

Held, that the vessel was not seaworthy, and the underwriter was not, therefore, liable on the policy.—*Watt v. Morris*, 1 Dow, 32.

2. *Particular Custom*.—Where there is a custom in the mode of carrying on a certain trade in a particular part of the world, but that custom though general, is not so universal as to be treated as an established custom of trade there, it must be communicated to persons about to insure a vessel engaged in that trade. If not so communicated it will be fatal to an action on a policy of insurance.—*Tennant v. Henderson*, 1 Dow, 324.

INSURANCE—continued.

See *Reed v. Harvey*, 4 Dow, 97; *Lindenau v. Desborough*, 8 B. & C. 586; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Whellon v. Hardisty*, 8 El. & Bl. 232.

3. *Seaworthiness*.—Insurance effected in Scotland on a vessel then lying at Beliza, in Honduras, for a voyage from Honduras to London. The ship sailed on the voyage and, without weather sufficiently bad to account for it, became very leaky and was obliged to put back and was lost:

Held, that if a vessel, a short time after leaving the port where the voyage commenced, and without meeting very bad weather, was obliged to return, the presumption was that it had not been seaworthy when the voyage began, and in such a case the *onus probandi* was on the assured.—*Watson v. Clark*, 1 Dow, 336.

See *Gibson v. Small*, 4 H. L. Cas. 353; *Hollingsworth v. Brodrick*, 7 Ad. & El. 46.

4. *Abandonment on Seizure*.—Ship and cargo insured (1801) at and from London to the Coast of Africa &c., and thence to the West Indies and America. Among the perils insured against were "the barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof." On arrival in Africa the crew, in the absence of the master, mutinied and resolved to carry the ship into an enemy's port. They drove away the mates, giving them a store of the provisions, and put the ship under the management of the boatswain, who, instead of steering for an enemy's port, steered for Barbadoes, where the ship was taken possession of by the King's agent, and the ship, outward cargo, and stores, sold for the benefit of all concerned:

Held, that the assured were entitled to abandon and recover as for a total loss.—*Brown v. Smith*, 1 Dow, 349.

See Arnould on Marine Insurance, 817.

See *Kleinwort v. Shepard*, 1 El. & El. 452.

INSURANCE—continued

5. *Misrepresentation*.—II., a merchant of London, desiring to effect an insurance at Leih, represented (contrary to the fact) that he had done some insurance at Lloyd's upon the same voyage, and at the same premium as that arranged with the Leih underwriters. They, believing these representations, and trusting to the judgment of the London underwriters, insured the vessel:

Held (reversing the judgment of the Court of Session), that this misrepresentation, though not one which affected the risk itself, was a fraud which vitiated the policy.—*Sibbald v. Hill*, 2 Dow, 263.

6. *Part of the Voyage*.—An English vessel was chartered from Odessa to Rotterdam, but war having, before the vessel's departure from Odessa, broken out between England and Holland, the master was instructed by the freighters agents at Odessa, that, in case he could not get to Rotterdam, he might proceed to Hamburg or Bremen, but he was to come to London or Newcastle in the first instance, where he might receive farther instructions—the difference of freight to be settled by arbitration. The vessel sailed from Odessa, and was captured in the Greek Archipelago. The master made a protest at Patras, in which he stated that, when captured, the ship was on a voyage from Odessa to Rotterdam. An insurance had been effected on freight on a voyage from Odessa to England:

Held, that the insurers were liable, though this was only for a part of the voyage originally intended.—*Hall v. Brown*, 2 Dow, 367.

See 1 Marshall on Insurance, 333.

7. *Abandonment on Capture*.—Where on intelligence of the capture of his vessel the owner gives to the underwriter notice of abandonment, which is accepted by the underwriter, the transaction is closed, and is not re-opened because the vessel is afterwards recaptured.—*Smith v. Robertson*, 2 Dow, 474.

See *Stewart v. The Greenock Marine Insurance Company*, 2 H. L. Cas. 159; *The Scottish Marine Insurance*

INSURANCE—continued.

Company v. Turner, 4 H. L. Cas. 312, n;
Jardine v. Leathley 3 B. & S. 700.

8. *Damage and Delay*.—A cargo of tobacco was insured on a voyage from *Greenock* to *Bremen*. The ship sailed 30th November 1798, but meeting with very heavy weather, and parting from convoy, it put into *Korshaven*, in *Norway*, and remained there through bad weather and from fear of *French* privateers, till 24th April 1799, when it sailed from *Korshaven*, and, under convoy, got into *Bremen*, where part of the cargo was found to be much damaged, and was sold :

Held, that under these circumstances the underwriters were liable for a partial loss.—*Smith v. Macneil*, 2 Dow, 539.

The damaged portions of the tobacco were sold at *Bremen* for the best price that could be got, the sound portions were retained :

Held, that in the absence of fraud this was not an improper mode of proceeding.—*Id.*

9. *Seaworthiness*.—When a ship soon after sailing on a voyage insured, is found to be unfit for sea, the question of seaworthiness at the commencement of the risk, or of the voyage, must be decided by rational inference from the circumstances.—*Parker v. Potts*, 3 Dow, 23.

A ship is, *prima facie*, deemed seaworthy. But when, without adequate cause, by stress of weather or otherwise, it is found not to be so, it is a rational and proper conclusion that the ship at the time of sailing was not seaworthy.—*Id.*

If the ship is seaworthy at the time of sailing, however soon it may become otherwise, a warranty of seaworthiness is complied with.—*Id.*

10. *Seaworthiness*.—Under an implied warranty as to seaworthiness, it is necessary not only that the hull of the vessel should be tight, staunch, and strong, but that the ship should be furnished with ground tackling sufficient to encounter the perils of the sea.—*Wilkie v. Geddes*, 3 Dow, 57.

INSURANCE—continued.

Where, therefore, it appeared that the best bower anchor, and the cable of the small bower anchor, were defective, the vessel was held not to be seaworthy.—*Wilkie v. Geddes*, 3 Dow, 57.

11. *Misrepresentation*.—It is a first principle of the law of insurance, that when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void, and there is no contract, if there should be a misrepresentation.—*Newcastle Fire Insurance Company v. Macnamara & Company*, 3 Dow, 255.

Whether the misrepresentation is in a material point or not, or whether the risk was equally great in one class or another, makes no difference, the only question being, is this in fact the thing insured.—*Id.*

See *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

12. *Misrepresentation*.—Instructions were given to effect an insurance "on fruit per 'Nancy,' Captain Johnson, from Lisbon for Clyde, premium 10 guineas per cent., to return 5 per cent. for convoy and arrival." It was known to the parties effecting the assurance that the vessel was what was called "a running ship," and would sail without convoy :

Held, that the underwriters had been misled, and that the assured could not recover on a policy framed on these instructions.—*Reid v. Harvey*, 4 Dow, 97.

13. *Seaworthiness*.—There is an implied warranty of seaworthiness in every voyage policy, and if the vessel is not seaworthy the underwriter is not liable. Therefore, where a ship sailed from *Leith* on a voyage to *North America*, and in a few days, on encountering a storm, proved to be very leaky and was obliged to put back, and was found on survey to be materially damaged :

Held (reversing a decision of the Court of Session), that the ship was not seaworthy when it sailed on the voyage insured.—*Douglass v. Scougall*, 4 Dow, 269.

INSURANCE—continued.

Per Lord Eldon (Chancellor): Though if this cause had come before him as an original cause, he was so clear upon the facts, that he would have given costs to the underwriters; he could now only reverse the judgment of the Court below, but could not give costs on the reversal.—*Douglas v. Scougall*, 4 Dow, 269.

See *Gibson v. Small*, 4 H. L. Cas. 353; *Faucus v. Sarafeld*, 6 El. & Bl. 192.

14. *Misrepresentation*.—A positive representation of the day on which the ship has sailed or will sail, and whether abroad or not, is material, and a misrepresentation on either of these points will avoid the policy.—*Arnot v. Stewart*, 5 Dow, 274.

15. *Companies' Policies*.—Before the statute 6 Geo. 1, c. 18, by which the monopoly of insuring marine risks in partnership was given to two companies (the Royal Exchange and the London Insurance Companies), was repealed, the Albion Fire and Life Insurance Company of London, by their agent at Glasgow, agreed with certain persons at Glasgow for a general insurance on a steamboat, without any mention of an exception of sea risk, and paid the full premium. The agent, although apprised by the secretary of the Albion Company that they did not consider themselves at liberty to insure marine risks, never communicates that circumstance to the assured, and never delivers the actual policy, in which the exception of sea risk was inserted. The steamboat is lost by fire at sea, and an action is brought in the Scottish Courts on the original contract; concluding in the alternative for a policy conformable to the contract without the exception of the sea risk, or for payment of the sum for which the steamboat was insured. Judgment for the assured, in the Court of Session, on the ground that fire at sea in a steamboat was not a risk contemplated at the time when the statute 6 Geo. 1, c. 18, passed, and therefore was not within the limitation of that statute. This ground repudiated by the House of Lords, but the judgment of the Court below affirmed on

INSURANCE—continued.

another ground, viz., that that part of the statute which gave the monopoly of marine risks to the two companies, the Royal Exchange and the London, did not extend to Scotland: and that the contract being made in Scotland, and the action founded on that contract, the restriction in the statute did not apply, and the assured were entitled to recover.—*Pattison v. Mills*, 1 Dow & C. 342.

16. *Ports in Spain*.—Insurance on a vessel "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence and two other ports in Spain to a port in Great Britain." On arriving off Barcelona, the master was directed, on account of a contagious fever at that place, to proceed to Tarragona, there to discharge the cargo, and then to proceed to Saloe, a place round a head of land, about 10 miles distant. A storm arose, and every vessel at Saloe was wrecked. On the evidence, it appeared to the satisfaction of the Court below, that Saloe was entitled to be called a port, and the Court held that the assured was entitled to recover; and this decision was affirmed on appeal.—*Sea Insurance Company v. Gavin*, 2 Dow & C. 129.

17. *Abandonment*.—A vessel, insured under a time policy from August 1841 to August 1842, encountered very severe weather in the Indian seas, and was compelled, in May 1842, to put into the Mauritius. The master wrote to the owners telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money except on the undertaking to return direct to England, instead of proceeding to Bombay, as originally intended. He further stated that, on account of the very low state of freights in India, this would be better for their interests, which he said he consulted in everything he did. The agents for Lloyd's at the Mauritius, who were employed by the captain to act for him, wrote letters to the same effect. These letters were

INSURANCE—*continued.*

received at intervals between September and December, 1842, and in the latter month the owners wrote to the agents expressing their surprise at the amount required, but saying at the same time that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in London, apprising them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th of March, and was at first taken possession of by the agents for the owners. On the 30th of March, the owners abandoned to the underwriters:

Held, that under these circumstances they were not entitled to recover as for a total loss; for first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; and secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss.—*Fleming v. Smith*, 1 H. L. Cas. 513.

Though the master may, by an ordinary rule of law, be considered whenever the vessel is, by capture or other detentions or casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners, even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.—*Id.*

Per Lord Campbell: Notice of abandonment is necessary, in order to convert a constructive into an absolute total loss.—*Id.*

The cases of *Cambridge v. Anderton* and *Roux v. Salvador*, show that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so

INSURANCE—*continued.*

damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss in each of such cases is actual and not constructive total loss.—*Fleming v. Smith*, 1 H. L. Cas. 513.

Where a prudent owner, uninsured, would have sold, the case amounts to one of total loss.—*Id.*

18. *Abandonment—Freight.*—In all cases of insurance on a ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all the benefit or advantage incident to it, or rather, such property vests in the underwriters.—*Stewart v. The Greenock Insurance Company*, 2 H. L. Cas. 159.

Freight while the ship is in the course of carrying it is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters paying for a total loss.—*Id.*

A vessel in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached *Liverpool*, and while in the river there grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and after the survey, namely, on the 1st of September, the owner abandoned to the underwriters on ship, and claimed as for a total loss.—*Id.*

Held, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit in account, of the freight which had been received by the owner on the discharge of the cargo.—*Id.*

19. *Total Loss.*—A vessel is totally lost, within the meaning of a policy, when it becomes, as a ship, of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck.—*Irving v. Manning*, 1 H. L. Cas. 287.

INSURANCE—continued.

A loss is to be considered as total where a prudent owner, if uninsured, would not have repaired.—*Irving v. Manning*, 1 H. L. Cas. 287.

In a valued policy the agreed total value is conclusive.—*Id.*

A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages.—*Id.*

A ship was insured in a policy, in which the value was stated at 17,500*l.* The ship was injured by storms, was surveyed, and the repairs were estimated at 10,500*l.* When repaired, the vessel would have been of the marketable value of 9000*l.* The assured abandoned, and claimed as for a total loss. The jury found that, under the circumstances, existing in the case, a prudent owner, uninsured, would not have repaired the vessel :

Held, by the Lords, affirming the judgment of the Court below, that the assured could recover as for a total loss.—*Id.*

20. *Master's Duty—Bottomry Bond.*—It is the duty of a master in case of damage to the ship, to do all that can be reasonably done to repair the ship, bring home the cargo, and earn the freight.—*Benson v. Chapman*, 2 H. L. Cas. 696.

Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expense of repair ultimately proves to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss.—*Id.*

The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the ship-owner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship.—*Id.*

The owner of a ship insured ship and

INSURANCE—continued.

freight. On leaving *Pernambuco* in June, 1839, the ship struck on a rock and put back. After a survey, repairs were begun. They were continued for a long period, and the expenses of them much exceeded the value of the ship and freight. The master not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight, and cargo. On the 30th of December, 1839, the owner in *London*, on being shown a letter addressed to the agents of the lenders on bottomry, in which the great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship and freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The ship-owner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bonâ fide* without *laches*, and as a prudent owner of a ship and freight, if uninsured, would act :

Held, that in this case, which was one of constructive total loss, the master might have abandoned at *Pernambuco*, but that having there elected to repair, he must be treated for that purpose as the agent of the owner, whose acts bound the owner :

Held also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the Court could not infer that he would not have done so.—*Benson v. Chapman*, 2 H. L. Cas. 696.

See *Bristow v. Whitmore*, 9 H. L. Cas. 391.

21. *Abandonment—Freight.*—The owners of a vessel insured ship and freight, but, in consequence of disasters at sea, totally abandoned the ship, which, however, arrived in port, and freight was actually earned and paid ; but it was received by the underwriters on ship as incident to the abandonment :

Held, that the owners could not recover

INSURANCE—continued.

against the underwriters on freight.
—*Scottish Marine Insurance Company v. Turner*, 4 H. L. Cas. 312, n.

22. *Seaworthiness*.—By the law of *England*, in a time-policy effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach.—*Gibson v. Small*, 4 H. L. Cas. 353.

Per Lord Campbell: There is not, in a time-policy effected on a vessel then abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches.—*Id.*

Quære, whether there is any such implied condition in a time-policy effected on an outward-bound ship lying in a *British* port where the owner resides?—*Id.*

A policy of insurance was effected in *London* on the 27th of November, 1843, on a ship then abroad, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of 12 calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included." To a declaration for a total loss on the 14th October, 1843, by perils of the sea, the defendant pleaded that "ship was not, at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the declaration mentioned, seaworthy or in a fit and proper condition to go to sea; but, on the contrary thereof, was wholly unseaworthy." It appeared in evidence that on the 24th February, 1843, the ship was at sea severely damaged, and in that state it succeeded in reaching *Madras* in the course of the following day. The verdict found the plea to be proved in fact:

Held (affirming the judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench), that this plea did not afford a defence to the action, for that there was no

INSURANCE—continued.

implied condition that the ship should be seaworthy on the day when the policy was intended to attach.—*Gibson v. Small*, 4 H. L. Cas. 353.

23. *Misrepresentation*.—*F.* applied to an insurance office to effect a policy on his life. He received a form of "Proposals" containing questions requiring to be answered. Among those were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions *F.* answered "No." The answers were false. *F.* signed the proposals, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposals should form the basis of the contract." The policy mentioned several things which were "warranted" by *F.* The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "If anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the moneys paid should be forfeited:

Held, in an action on the policy, reversing the judgments of the Courts of Exchequer and Exchequer Chamber in *Ireland*, that it was a misdirection on the part of the judge to leave it to the jury to say whether the answers to the two questions were material as well as false, and if not material that the plaintiff was entitled to the verdict. The representation being part of the contract, its truth, not its materiality, was in question.—*Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

INTENTION.

Where parties to a deed of settlement contemplated several states of circumstances, and there is found on the face of the instrument a clear

INTENTION—*continued.*

and distinct intention to provide for one event which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events, or states of circumstances, which have not happened. — *Dill v. Haddington (Earl)*, 8 Cl. & F. 168.

INTEREST. See *BILLS AND NOTES*, 2.
EXCISE. MARRIAGE SETTLEMENT,
 16. *MORTGAGE*, 1. *PRACTICE*.

1. *J. M.* having recovered judgments against *W. L.* upon warrants of attorney, which purported to carry interest, and having by the decree been made accountable for the rents received from *W. L.*'s estates with interest:

Held, that under the circumstances the judgments ought also to carry interest. — *Morgan v. Evans*, 3 Cl. & F. 159.

Where money is payable, but not paid, though not through the fault of the person bound to pay it, he is liable by the law of *Scotland*, unless he consigns it (pays it into Court) to pay interest upon it. And the doctrine was applied even where the person liable to pay the money had instituted a suit of multipoleinding to have it decided to which of two contesting parties he was bound to make the payment. — *Macneil v. Jolly*, 2 Dow & C. 454; *Napier v. Gordon*, Id. 461.

2. A testator gave all his freehold and leasehold estates to trustees to the use of other trustees for a term; on trust, if there should be issue of his marriage, to raise 2000*l.* a year for his wife for her life, in lieu of dower; and if there should be younger children, to raise portions for them, to be paid to them in equal shares, in default of appointment by the wife, at the age of 21 if sons, and 21 or marriage, if daughters; but if these events should happen in the wife's lifetime, then the shares to be vested interests, payment to be postponed till her death, and the trustees of the term to raise in the meantime, out of the rents, &c., sums equal to

INTEREST—*continued.*

interest on the portions for their maintenance; and on farther trust, in case of the insufficiency of the personal estate for payment of debts and legacies which should become payable under the will, to raise, *after the wife's death*, by sale or mortgage, or out of the rents, &c. of the premises comprised in the term, a sufficient sum to pay said bequests or legacies. Subject to the term, the testator limited the estates to the first and other sons of his marriage in tail male, remainder to daughters in tail, and in default of issue, to his wife for life, in lieu and discharge of dower, and of all provision made for her by his own or his father's will, with divers remainders over. He then gave a great number of pecuniary legacies, some to be paid in any event, and with interest, others to be paid only in the event of his leaving no issue, and not expressed to bear interest; and of these latter, some were directed to be vested in stock for the benefit of relations for life, remainder to their children. And after directing that all the legacies should bear interest from the time they should become respectively payable, and be raised and paid accordingly, he charged the estates and premises comprised in the term with payment of such debts and legacies in case of the insufficiency of his personal estate, and he directed the trustees to raise the same, pursuant to the trusts vested in them for that purpose. The testator died without issue; his personal estate was exhausted in paying debts and the legacies that were directed to be in any event, and which were declared to have priority. The questions were, when were the other legacies to bear interest, and how was it to be paid?

Held, that the unpaid legacies were well charged on the lands comprised in the term, but not to be raised until after the death of the testator's wife, and that interest on them should be paid during her life out of the rents and profits of the said lands. — *Millown (Earl) v. Trench*, 4 Cl. & F. 276.

See *Massey v. Lloyd*, 10 H. L. Cas. 248.

INTEREST—*continued.*

3. *B.* mortgaged certain premises to *L.* The premises were required to be partly pulled down and rebuilt. *P.* undertook to perform the work, but required security for the payment. An agreement was entered into between *B.*, *L.*, and *P.*, by which *L.* consented to become tenant of part of the premises when rebuilt, and to take a lease of them from *P.*, to whom *B.* had assigned his interest for a term of years, and to pay *P.* 1000*l.* for the lease, and 250*l.* a year for rent. The premises having been rebuilt, *L.* entered into possession, but as no lease was granted by *P.*, did not pay the 1000*l.*, nor the 250*l.* a year rent. In a suit afterwards instituted by *P.*, and to which both *B.* and *L.* were parties:

Held, that the accounts of what was due to *L.* on the mortgage were not to be taken with annual rests, as the accounts on the other side could not be taken in the same manner, either as to the 1000*l.* or the 250*l.* a year rent.—*Page v. Linwood*, 4 Cl. & F. 399.

4. *B.* up to a certain period, made up half-yearly acknowledgments of the balances due from himself to *P.* On one occasion he gave an acknowledgment of a gross sum due from himself to *P.*; a part of the sum thus acknowledged to be due was formed of compound interest. *B.*, by a subsequent agreement with *P.*, bound himself to make up half yearly balances, and to pay the sums found due in respect of the building as the different parts of the work were finished and valued. *B.* did not keep up these payments:

Held, that when accounts were decreed, *P.* was not entitled to have them calculated with half yearly rests, the agreement not necessarily giving him any such right, and the precedent of the acknowledgment not establishing this as a settled mode of dealing between the parties, if such a mode could be legal by agreement or practice.

Quære, whether it could be legal?—*Page v. Broom*, 4 Cl. & F. 436.

5. On a judgment affirmed on a writ of

INTEREST—*continued.*

error, the House of Lords gives interest from the day of its affirmation by the Exchequer Chamber, pursuant to the provisions of the statute 3 & 4 Will. 4, c. 42, s. 30.—*Garland v. Carlisle*, 5 Cl. & F. 354.

6. A Scotchman in Calcutta opened an account with a banking and agency house there in 1786, and died in 1810, having been insane from 1793. A partner in the house, being in Scotland in 1812, inclosed, in a letter to the customer's relatives there, an account current with him from 1787 to 1810, signed by the firm, bringing out annual balances in his favour composed of annual accumulations of Indian interest; the last balance expressed "to bear interest at 9 per cent. per annum." In 1835, the customer's relatives obtained administration of his estates, and prosecuted actions, which were before commenced in the Scotch Courts on the account current, against another partner who joined the firm in 1793, and continued a partner through several changes till 1820; and they claimed interest at 9 per cent. upon the last balance in 1810, and upon the annual accumulations thereof since:

Held, by the Lords, first (concurring with the Court below), that a debt was sufficiently constituted against the firm by the account rendered by them, together with interest at 9 per cent. on the last balance in 1810, down to final decree, and that one partner was bound by the account so rendered; secondly (differing from the Court below), that the debt did not carry compound interest from 1810.—*Fergusson v. Fyffe*, 8 Cl. & F. 121.

There cannot be a title to compound interest without a contract express or implied, or custom.—*Id.*

By the law of England, a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions.—*Id.*

7. A suit was instituted in the Court of Chancery in Ireland by the trustees of *A.*'s will, for carrying the trusts thereof into execution, and for administration of his estate; and *B.*

INTEREST—continued.

one of the defendants thereto, and who was entitled to the residue of *A.*'s estate, having died before decree, bills of revivor, and supplemental and amendment, were filed by the plaintiffs in the original suit, against *B.*'s personal representatives, and against all the parties interested under his will in his real and personal estates; and a decree was made, directing accounts to be taken of the personal estates, debts, and legacies of *A.* and *B.* respectively. By a subsequent decree, affirmed by the House of Lords, certain unpaid legacies of *B.*, and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of *C.*, the tenant for life thereof under *B.*'s will, but the interest to be paid out of the rents and profits during *C.*'s life. On a question subsequently arising between *C.* and *D.*, the tenant in tail of the real estates, after *C.*'s life estate, whether a fund in Court, part of *B.*'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or rateably in payment of the legacies and of the interest; the Master of the Rolls and Lord Chancellor of *Ireland*, made orders directing the fund to be applied exclusively in payment of the arrears of interest; and the Lord Chancellor refused to direct an inquiry as to how much of the fund in Court was principal, and how much accumulated interest:

Held, on appeal against these orders, that any question as to the application of *B.*'s personal estate could not be regularly adjudicated in this form of suit, between the co-defendants *C.* and *D.*; and the orders appealed from were affirmed, with a variation and declaration that they should be without prejudice to any question between *C.* and *D.* as to the manner in which the principal and interest of the legacies should be paid.—*Coote v. Trench*, 9 Cl. & F. 74.

8. *T.*, a solicitor, had, by a sale to his clients of premises which really belonged to himself, but the knowledge of which fact he concealed from them, been guilty of a breach of

INTEREST—continued.

trust in his character of a solicitor. He had made a large profit on the sale, was ordered to pay back the amount of this profit, with the full amount of interest given in cases of breach of trust, namely, 5 per cent.—*Tyrrell v. The Bank of London*, 10 H. L. Cas. 26.

9. If the principal of a child's portion is not raisable till the death of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words.—*Massy v. Lloyd*, 10 H. L. Cas. 248.

Lord *Cottenham*'s observations on the point in *Milltown (Lord) v. Trench*, 4 Cl. & F. 307-8, adopted.—*Id.*

INTERPLEADER. See MULTIPLE-POINDING.

The directors of the *E. I. Co.* having in their hands the sum of 5577 *l.* arising from the sale of goods consigned to *B. & Co.*, on which *C.*, owner of the ship on board of which the goods had been brought into the *E. I. Co.*'s docks, claimed to have a lien for freight, paid 2000 *l.*, part of said sum, to *B. & Co.* on account, and 849 *l.* to *C.* An action having been afterwards brought by *C.* for 1908 *l.*, the residue of his claim, and *B. & Co.* having threatened an action for the whole balance remaining in the directors' hands, the latter filed a bill of interpleader against *C.* and *B. & Co.*, and paying that balance into Court, obtained an injunction to restrain the proceedings at law. The cause was heard, and a decree pronounced, directing an issue to be tried at law between *C.* and *B. & Co.*, in which *C.* ultimately established his claim, the directors taking no part in that proceeding. The sum paid into Court being insufficient to answer *C.*'s claim with the interest that had accrued thereon during a protracted litigation, the directors were ordered, on the hearing of the cause on further directions, to pay into Court, as subject to *C.*'s lien, the 2000 *l.* which they had already paid to *B. & Co.*:

Held, by the House of Lords, that this latter order was inconsistent with

INTERPLEADER—*continued*.

the principles of an interpleader suit; that the plaintiffs in that suit having paid into Court under its order the whole sum which was the subject of interpleader, were discharged from farther obligation; that the protracted litigation which increased the claim of one of the conflicting defendants beyond the sum in Court, being caused not by the plaintiffs, but by the other conflicting defendants, who were parties to the appeal, and the money being paid to them, and never having been the subject of the interpleader suit, they were the parties really liable to satisfy the claim established by *C.* with costs.—*East India Company v. Campion*, 4 Cl. & F. 616.

INTESTATES' ESTATES. *See* CROWN.

1. Money paid to one Sovereign in right of the Crown to the produce of intestates' estates where there is no next of kin, cannot, if improperly paid, be recovered from that Sovereign's successor. The nominee of the Crown taking out administration to the estate of an intestate, is under the same obligation as any other administrator. The 15 *Vict.* c. 3, only dispenses with the necessity of his giving the usual bond to the ordinary, but imposes on him all the duties and liabilities of a private administrator. If he improperly pays to the Crown part of the intestate's effects, though such payment is made under the authority of a warrant under the sign manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled.—*The Attorney General v. Köhler*, 9 H. L. Cas. 654.

Upon his death that liability only continues against his personal representatives, and not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration *de bonis non* to the same estate.—*Id.*

Where the nominee of the Crown had improperly paid money (thus coming to his hands) to the then

INTESTATES' ESTATES—*continued*.

Sovereign, and the succeeding nominee of the Crown had taken out letters of administration *de bonis non* to the same estate, and, in a suit by the next of kin against him, had only contested the fact of the claimants being truly the next of kin, and denied, if they were so, liability to pay interest on the sum claimed:

Held, that this was in substance an admission of liability to pay the principal to the next of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay principal.—*The Attorney General v. Köhler*, 9 H. L. Cas. 654.

A., a defendant, as administrator on the nomination of the Crown, in a suit by the alleged next of kin, died; *B.*, his successor in office, took out letters *de bonis non*. A bill to revive the suit was filed, and an order made thereon recited the prayer of the bill thus: "that the said suit and proceedings, which had so become abated as aforesaid, might be revived, and be in the same plight and condition against *B.* as they were at the time of the death of *A.*, and that the plaintiffs might have the same relief against *B.* as they would have been entitled to and had against *A.* had he still been living," and then added, "which is hereby ordered by the Court as prayed:"

Held, that this order did not of itself create any liability in *B.*, but merely put the suit in the same state as it had been in before *A.*'s death.—*Id.*

No costs were given.—*Id.*

"INTIMIDATION."

A count charging defendants with conspiring "to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, "changes in the government, laws, and constitution of the realm,"

"INTIMIDATION"—*continued.*

is bad; first, because "intimidation" is not a technical word having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what specie of intimidation is intended to be produced, or on whom it is intended to operate.—*O'Connell v. The Queen*, 11 Cl. & F. 155.

IRISH TENANTRY ACTS. *See* AFFIDAVIT. LEASES FOR LIVES.

1. Notice in 1810, under the Tenantry Act, by a landlord to a tenant of a lease for lives, renewable for ever, to pay his several fines, and to renew. Tenant ready to pay his fines immediately on notice; but a difficulty arises respecting collateral matters of encroachment and breach of covenant, and a correspondence on these points takes place between the parties; in point of fact, no tender of the fines is made till upwards of three years after the notice:

Held, that as the landlord knew that the tenant was always ready to pay the fines, and that as the difficulty in the way of renewal arose from a collateral matter, the principal of neglect or unreasonable delay did not apply here, as the landlord might have accepted the fines, and renewed without prejudice to his rights as to the collateral points; and that the want of tender, under the circumstances, was immaterial, as the tenant knew that the fines though tendered, would not be accepted. Adjudged that the tenant was entitled to a renewal, reserving the rights of the landlord to the collateral matters.—*Trant v. Dwyer*, 1 Dow & C. 125.

2. Tenant pays money into Court, under the Tenantry Act, to save his forfeiture. The six months allowed by the statute expire on the 18th January, 1824, on Sunday. The tenant files his bill to redeem, in the Exchequer, on Saturday the 17th; and the Court not being then sitting, and none of the barons being in town, one of them residing near *Dublin*, makes an order, dated the 17th, to pay the money into the Bank of *Ireland*. This order is on the same day left with the Ac-

IRISH TENANTRY ACTS—*continued.*

countant General, and the money is paid to his account on the 19th, and he certifies its being paid in of that date. The Court, on the motion of the tenant, makes an interlocutory order on the Accountant General to alter the date of his certificate from the 19th to the 17th; but this order reversed on appeal, as standing in the way of a thorough investigation of the merits at the hearing.—*Vesey v. Bodkin*, 1 Dow & C. 456.

3. For the purposes of the *Irish Tenantry Act* (19 & 20 *Geo.* 3, c. 30) a mortgagor in possession (without notice of the mortgage to the landlord) is the agent of the mortgagee to receive notice of a demand of the fines to be paid on the renewal of a renewable lease for lives.—*Galbraith v. Cooper*, 8 H. L. Cas. 315.

The statute is addressed solely to courts of equity, and was intended not only to protect the assignee of a lease against neglect, but to enable the landlord to secure himself by his vigilance against the misconduct of his tenant.

Where the tenant has assigned the whole interest by way of mortgage, but remains in possession, and no notice of the mortgage is given to the landlord, a notice to the mortgagor in possession to renew is sufficient, and if payment of the fine is unreasonably neglected, neither the mortgagor nor mortgagee can come to equity for relief.—*Id.*

An assignee of a lease is liable to all the covenants which run with the land, whether the assignment is absolute or by way of mortgage.—*Id.*

And, as a general rule, the mortgagee will be bound by the acts of the mortgagor, whom he has suffered to remain in possession. That would have been so before the statute, and is so under its provisions.—*Id.*

The register, in such a case, is not notice to the landlord of the mortgage. A mortgagee is equally "an assign" within the statute, whether the mortgage is registered or not.—*Id.*

Per Lord Wensleydale: The demand

IRISH TENANTRY ACTS—*continued.*

of the fines ought not to be made, at the option of the landlord, on the tenant or his assign, but on him whom the landlord would, under existing facts, reasonably consider as the person entitled to ask for a renewal.—*Galbraith v. Cooper*, 8 H. L. Cas. 315.

4. The 5th section of the 12 & 13 Vict. c. 105, is exceptional, and applies to all cases where there is some peculiar and extraordinary belonging to an estate which under that statute is converted from a leasehold for lives, renewable for ever, into a fee farm tenure.—*Donegall (Marquis) v. Layard*, 8 H. L. Cas. 460.

Such a conversion took place. The affidavit in support of the claim for extra compensation stated the opinion of the solicitor "that but for the passing of the Act, the majority of the tenants of the *Donegall* estate holding such renewable leaseholds would willingly have paid substantial sums of money as a consideration for fee farm grants," that since the passing of the Act the tenants had not been willing to do so; but that some had agreed to pay increased rents, and that in his opinion the difference was "an amount equal to two years' purchase upon the annual value of the premises:"

Held, that this was not sufficient to constitute an exceptional case within the section.—*Id.*

5. Septennial fines only become payable under the 19 & 20 Geo. 3, c. 30 (the *Irish Tenantry Act*), where the non-payment of a fine on the dropping of a life in a renewable lease is the fault of the tenant. The right to such septennial fines is given by the Act as a consequence of the tenant's neglect.—*Aldworth v. Allen*, 11 H. L. Cas. 549.

Where such renewal fine, and the rent, &c., have been properly calculated, and the calculation transmitted to the landlord or his agent, and admitted to be correct, and an offer to pay the amount has been made, accompanied by a demand for a renewal, and the grant of the renewal has been postponed for the

IRISH TENANTRY ACTS—*continued.*

landlord's convenience, he cannot afterwards, by imposing conditions and requiring proof of the tenant's title, open up the whole matter, and make the delay, which thenceforward occurs, the ground for demanding septennial fines, and rely on the refusal to pay them as a cause of forfeiture.—*Aldworth v. Allen*, 11 H. L. Cas. 549.

- A. granted a lease for three lives renewable for ever. In 1844 two of the lives having dropped, the tenant sent in a demand for renewal, together with the calculation of rent, fines on the dropped lives, &c., and an offer to pay what was due. The account was acknowledged to be correct, but the renewal was put off on account of the landlord's absence from *Ireland*. In 1845 and 1846 a correspondence occurred between the agents, and on the part of the landlord the tenant was required, by a given day, to prove strictly his title to renewal, and also to pay all the renewal and septennial fines calculated up to that time. These last were demanded, under the statute, as a consequence of the non-payment of the ordinary renewal fines when originally demanded. These conditions were not complied with, and some years afterwards a bill was filed to compel a renewal:

Held, that the tenant was entitled to a decree for renewal without paying the statutory septennial fines.—*Id.*

IRRITANT AND RESOLUTIVE
(PROHIBITORY AND PENAL)
CLAUSES. See ENTAIL.ISSUE FROM CHANCERY. See
CHANCERY. HEIR. LEGITIMACY.

1. On a bill to carry the trusts of a will into effect, two questions were raised: one of law, on the construction of the will; the other of fact, as to the legitimacy, to be ascertained by the trial of an issue:

Held, that the judge exercised a sound discretion in directing the issue first, and declining to decide the question of law until the plaintiff established his right to ask for that decision by

ISSUE FROM CHANCERY—*continued.*

showing that he filled the character he had assumed.

Quare, whether Lord *Eldon* meant what was ascribed to him as approving the contrary practice, in *Gordon v. Gordon*, 3 Sw. 468?—*Malone v. Malone*, 8 Cl. & F. 179.

Where a plaintiff claimed as heir male of *R. M.*, deceased, stating in his bill that he was *R. M.*'s eldest son, born after his marriage with plaintiff's mother, and naming a specific date of the marriage.—*Id.*

Held, 1. That the question of plaintiff's legitimacy would be satisfactorily determined by an issue in terms "to try whether he was the heir at law of *R. M.*, &c."—*Id.*

2. That although a marriage of the date stated in the bill, and proved by the depositions of the witnesses in the cause, would disprove the plaintiff's title; and a marriage of a different date establishing his legitimacy was proved by the same witnesses at the trial of the issue; these were not sufficient grounds for dismissing the bill without further investigation, it appearing that the witnesses on both occasions deposed correctly to the main facts, but were under a misapprehension of the dates.—*Id.*

Where a Court of Equity directs an issue in a cause in which there are many parties, and selects some to have the conduct of the trial, giving all leave to attend, all the parties are bound by the result.—*Id.*

An order directing an issue "with the consent of all parties in the cause," is erroneous, so far as it purports to be with the consent of an infant party.

Quare, whether, if the infant gave consent, he is bound by it? But if the order for the issue was a right order to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, especially as he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defence.—*Id.*

Quare, whether it is clear on the authorities, that an infant defendant, in a case such as this, is

ISSUE FROM CHANCERY—*continued.*

entitled, after coming of age, to put in a new answer and make a new defence?—*Malone v. Malone*, 8 Cl. & F. 179.

2. To a bill by the rector for an account of tithes against the owner and occupiers of land in the parish, they set up a *modus* of 13 l. 6 s. 8 d., payable half yearly; and they showed receipts for that payment under various descriptions, as "rent for the rectory," and "prescribed rent due to the rector," from the year 1637, with some interruptions; and also receipts for a payment of 8 s. 9½ d., which was supposed to be a payment in respect of tenths due from the rector to the Crown:

Held, by the Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court to direct an issue to try the existence of the alleged *modus*, the evidence against it being free from doubt. A landowner cannot, like a rector, insist on an issue as a right, but in doubtful cases it is granted.—*Cairns v. Raine*, 12 Cl. & F. 833.

JOINT STOCK COMPANY. *See* DIRECTION. FRAUD. PARTNERSHIP. WINDING-UP.

1. By the deed of co-partnership of a joint stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company. *A.* purchased shares, and executed some of the acts required to constitute him a member of the company, but left one of these acts unexecuted:

Held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract. A Joint Stock Marine Insurance Company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing

JOINT STOCK COMPANY—*continued*.

state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares:

Held, that he could not relieve himself from his contract on account of these representations:

Held also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint stock company is not like an ordinary partnership, bound by the acts of any individual member of it. If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished for conspiracy.—*Burnes v. Pernell*, 2 H. L. Cas. 497.

See *Bain v. Whitehaven Railway*, 3 H. L. Cas. 1; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Carron Company v. Maclaren*, 5 H. L. Cas. 416; *Venezuelan Company v. Kisch*, L. R., 2 H. L., 111; *Oakes v. Turquand*, L. R., 2 H. L., 339.

2. The Irish statute, 33 Geo. 2, c. 14, is repealed, so far as joint stock banks in Ireland are concerned, by the Imperial statute 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other.—*O'Flaherty v. Macdowell*, 6 H. L. Cas. 142.

A joint stock banking company in Ireland is within the provisions of the 8 & 9 Vict. c. 98.—*Id.*

3. There can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract, in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

A contract by the directors of one company to purchase the trade of another company, is not binding, unless it is authorised by the deed of

JOINT STOCK COMPANY—*continued*.

settlement of each company, and is made according to its provisions.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

Quare, whether, when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant? what are the powers of directors?—*Id.*

Circumstances under which each company was directed to pay its own costs.—*Id.*

4. A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment with interest. By several statutes the Exchequer Loan Commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls, profits, &c. of such works, and priority is given to mortgages given to the Commissioners over mortgages made to private individuals, except *bonâ fide* creditors who at the time of the advances by the Commissioners are entitled to repayment. One of these statutes (57 Geo. 3, c. 34) provides, that where four-fifths in value of the creditors shall agree in writing that a priority over their claims shall be given to the Commissioners, such consent shall be binding on all the creditors. The creditors of this company entered into an agreement, by which they consented to give the Commissioners' mortgage priority over their own securities "in manner following:" in the first place, that the Commissioners should, out of the annual rates, &c., be paid interest; in the next, that they should then be paid interest; and lastly, that the surplus should be then applied in discharge of the principal sum advanced by the Commissioners until that principal sum should be repaid, in preference to all other claims:

Held, that an agreement giving this qualified priority to the Commissioners was valid under the statute.—*South Eastern Company v. Jortin*, 6 H. L. Cas. 425.

5. The 1 & 2 Will. 4, c. 24, gave the

JOINT STOCK COMPANY—*continued*.

Commissioners, in case of default of payment, power to enter and sell. The 5 & 6 Vict. c. 9, enacted that the property sold by the Commissioners should be held freed and discharged from all claim and demand of the mortgagors or of persons claiming under them, in all respects, as if they were foreclosed, "provided that nothing herein contained shall prejudice the rights" of any creditors "in respect of any surplus" arising on the sale:

Held, that under these statutes the Commissioners had a legal right to enter and sell; that after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors; but that this liability could be enforced against the Commissioners only, and not against the purchasers.—*South Eastern Company v. Jortin*, 6 H. L. Cas. 425.

6. The funds of a joint stock company established for the purposes of one undertaking cannot be applied to another, and the attempt so to apply them, though sanctioned by all the directors, and by a large majority of the shareholders, is illegal. But where a company was established "for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects;" and the directors, while the hotel was in the course of being built, agreed to be let off, for a stipulated period of short duration, a large portion of it to the head of a Government department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business, and that a majority of shareholders had sanctioned the act; it was

Held, that the arrangement was valid within the words of the clause, "all such things as are incidental or conducive to the attainment" of the objects for which the company was established.—*Simpson v. The West-*

JOINT STOCK COMPANY—*continued*.

minster Palace Hotel Company, 8 H. L. Cas. 712.

The Lords Justices were divided in opinion as to the propriety of the Vice-Chancellor's decree, and so no costs were given in this House.—*Id.*

JUDGES. *See* COUNSEL, 2.

1. The judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of existing laws.—*In the Matter of the London and Westminster Bank*, 2 Cl. & F. 191.
2. The House of Lords has a right to require the judges to answer abstract questions on existing law.—*Macnaghten's Case*, 10 Cl. & F. 200.
3. A public company, which was incorporated, filed a bill in equity against a landowner, in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor:

Held, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in the cause, and that his decree was, therefore, voidable, and must, consequently, be reversed.—*Dimes v. Grand Junction Canal Company*, 3 H. L. Cas. 759.

Held also, that the Vice-Chancellor is, under the 53 Geo. 3, c. 24, a judge subordinate to, but not dependent on, the Lord Chancellor, and that, consequently, the disqualification of the Lord Chancellor did not affect him; but that his decree might be made the subject of appeal to this House.—*Id.*

4. Before a decree made by the Vice-Chancellor can be appealed against, it is required to be enrolled. The

JUDGES—*continued*.

enrolment is the act of the Lord Chancellor :

Held, that the act of enrolment, though performed by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to this House.—*Dimes v. Grand Junction Canal Company*, 3 H. L. Cas. 759.

The judges are not to be consulted on a claim to sit and vote in the House of Peers.—*The Wensleydale Peerage Case*, 5 H. L. Cas. 958.

JUDICIAL FACTOR.

In a creditor's suit, a *Scotch* Court is not bound to appoint a common agent, but may entrust the performance of his duties to the hands of a judicial factor.—*Hamilton v. Littlejohn*, 4 Cl. & F. 20.

JURISDICTION. See CHANCERY. DOMICILE. FOREIGN COURT. FOREIGN LAW. FOREIGN SOVEREIGN. INFANT. PRACTICE.

1. The Spiritual Court is prevented by the Act 27 Geo. 3, c. 44, from proceeding against clergymen, as well as laymen, for fornication or incontinence, after the expiration of eight months from the time of the offence committed *pro salute animæ et reformatione morum* : but the Court may take cognizance of charges of that description against clergymen after the expiration of the eight months, with a view to suspension or deprivation, or other punishment merely clerical. [Plaintiff in prohibition not allowed his costs where, though he succeeded in a minor point, he failed as to the main object.]—*Free v. Burgoyne*, 1 Dow & C. 115.

2. Jurisdiction of the Lord Chancellor in the Court of Chancery, to control the authority of the parent over the children, or to deprive him of their care and custody, for proper cause, long acknowledged and acted on in the Court below, now for the first time affirmed, on appeal by the

JURISDICTION—*continued*.

House of Lords.—*Wellesley v. Wellesley*, 1 Dow & C. 152.

3. Error assigned ; for that it appeared by the record that, on certain issues, the jury had given no verdict at all, and that it did not appear upon the record that both parties had given their consent to such discharge :

Held, by the Lords affirming judgments of the King's Bench and Exchequer Chamber, that this is no error, as the judges may of their own authority discharge the jurors.—*Powel v. Sonett*, 1 Dow & C. 56.

4. Though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.—*Bandon v. Becher*, 3 Cl. & F. 479.

5. The Court of Session is competent to entertain a suit by the prosecutor against the Presbytery, for trials and settlement according to the presentation.—*Auchterarder Presbytery v. Kinnoull (Earl)*, 6 Cl. & F. 646.

6. A bill was filed in Chancery in *Ireland*, impeaching leases and mortgages as not in due execution of powers in a settlement ; also impeaching, on various grounds, a decree of the Court of Exchequer, and a sale in pursuance thereof, of the mortgaged estates, subject to the leases. When the cause came to be heard, the plaintiff's counsel informed the Court that no judgment would be required as between the plaintiff and mortgagees, an arrangement being in progress by which the mortgagees and purchaser under the Exchequer decree consented to a redemption of the estates, on payment by the plaintiff of a sum certain. The Lord Chancellor then heard counsel as to the validity of the leases, but conceiving that the consideration of the question, as to the validity of the mortgages and sale, was withdrawn

JURISDICTION—*continued.*

by the arrangement, and that in the absence of the purchaser he had no jurisdiction to give a decision on the leases; he dismissed the bill as against the defendants, claiming the benefit of them:

Held, by the Lords, on an appeal against a decree made on rehearing, which reversed the decree of dismissal, that it was open to the Lords to consider the merits of this decree though not appealed from, and to declare that the arrangement, instead of withdrawing from the consideration of the Court the plaintiff's claim to relief against the mortgages and sale, was an admission of his right to that relief; that the decree of dismissal was, therefore, erroneous, and that it was competent to the Lord Chancellor, at the time of making that decree, to adjudicate as to the validity of the leases; and the cause was remitted to the Court of Chancery, to be heard on that question.—*Sheehy v. Lord Muskerry*, 7 Cl. & F. 1.

7. The House of Lords will, on appeal, interfere with the practice of the Courts below in respect of procedure, when the form of procedure, admitted below, appears to be incompetent, and to lead to dangerous results.—*Fleming v. Dunlop*, 7 Cl. & F. 43.

8. After the 1st day of August, 1886, it became competent to the Lord Chancellor, under the 5 & 6 Will. 4, c. 76, s. 71, to make new appointments of trustees of charity estates and funds theretofore administered by corporations.—*Bignold v. Springfield*, 7 Cl. & F. 71.

9. The Courts in *Scotland* have no power to appoint persons to administer personal property in *England*, that power being exclusively vested in the *English Ecclesiastical Courts*; and of that the *Scotch Courts* are bound to take notice.—*Preston v. Melville*, 8 Cl. & F. 1.

Quere, whether the Court of Session has the power to appoint trustees, where the trustees named by the author of a trust disposition decline to act.—*Id.* 16.

JURISDICTION—*continued.*

10. The law of the country where a contract is made, or is to be performed, furnishes the rules for expounding the nature and extent of its obligations; but the law of the country where it is sought to enforce performance of a contract, governs all questions as to the remedy and mode of proceeding, including lapse of time.—*Fergusson v. Fyffe*, 8 Cl. & F. 121.

11. The Act 5 & 6 Will. 4, c. 76, creates a trust of the property of municipal corporations, and of the funds raised for the purposes of the Act, subject, like other property held in trust, to the jurisdiction of the Court of Chancery. Although the Act contains provisions for correcting abuses in respect of the borough property, there is nothing in it to exclude the ordinary jurisdiction of the Court of Chancery to prevent breaches of trust:

Held, accordingly, by the Lords (affirming the judgment of the Court of Chancery), that a bond given by the town council of a borough, to secure compensation out of the borough fund to an officer, for the profits of offices, some of which he continued to hold, was a breach of trust, and illegal.—*Parr v. The Attorney General*, 8 Cl. & F. 409.

12. The jurisdiction of the Court of Session is, by the 59 Geo. 3, c. 116 (the *Edinburgh Water Company's Act*), taken away in "all actions or suits relative to the Act."—*Balfour v. Malcolm*, 8 Cl. & F. 485.

An action of declarator at the suit of the company's officer, to obtain a declaration of the company's right to rates, cannot therefore be brought in the Court of Session. The proceedings to recover such rates must be taken before the Sheriff of *Edinburgh*.

Where a party disputing a rate institutes proceedings before the sheriff, to have the particular sum due from him declared, and the company's officer at the same time institutes a suit of declarator in the Court of Session to have the general right of the company as to the mode of calculating the rate declared a plea of

JURISDICTION—continued.

lis alibi pendens, is no answer to such suit.—*Balfour v. Malcolm*, 8 Cl. & F. 485.

13. A *Scotchman*, by deed duly made in the *Scotch* form, appointed his wife and eight other persons, all domiciled and resident in *Scotland*, to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to *England*, and after residing for three years in various places there for the health of both, the widow died, recommending the infant to the care of the grandfather, who was then residing in *England*. The grandfather filed a Bill in Chancery, in the infant's name, for the sole purpose of making her a ward of Court, and preventing her removal to *Scotland*; upon a contest arising between him and the *Scotch* tutors for the guardianship of the infant, the Lord Chancellor made an order in the usual form referring it to the Master to approve of proper persons to be guardians:

Held, by the Lords (affirming that order),

1st. That the *Scotch* testamentary tutors were not testamentary guardians in *England* according to the Act 12 Car. 2, c. 21.

2nd. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in *Scotland*.—*Johnstone v. Beattie*, 10 Cl. & F. 42.

3rd. That the Court was bound to appoint guardians to the infant, she being made a ward by the filing of the bill; and although the *Scotch* testamentary tutors had the exclusive control of all her property, and were answerable to the *Scotch* Courts only, they had no authority over the infant in *England*, nor power to protect her, nor were entitled by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in *England*. (*Dissentientibus* Lord Brougham and Lord Campbell).

JURISDICTION—continued.

4th. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction.

Quære, whether a bill filed to make an infant a ward of Court, ought not to allege some right or claim of the infant to property within the jurisdiction, although untrue?—*Johnstone v. Beattie*, 10 Cl. & F. 42.

See *Stuart v. Bate*, 9 H. L. Cas. 440; *Moorhouse v. Lord*, 10 H. L. Cas. 272.

14. The statute 6 & 7 Will. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions, an appeal to the Quarter Sessions. This would not deprive a party aggrieved of his right to apply for the interference of a Court of Equity if he was in other respects entitled to that interference.—*Beaufort (Duke) v. Neeld*, 12 Cl. & F. 248.

15. *N.* and *S.* contracted with a railway company, jointly and severally, to execute railway works according to specifications and prices contained in a former contract between *N.* and the company. *S.* was to advance the money necessary for the execution of the works, and to receive from the company all monies accruing due from them in respect of the works, and apply them in discharge of *N.*'s liabilities under his contracts. *S.* became a bankrupt at the completion of the works, and the company, after paying him and his assignees part of the monies due from them, refused to account with *N.* for the balance, whereupon he filed a bill for an account against them and *S.*'s assignees:

Held, that although the case against the company consisted of matters cognisable at law, yet, as there were complicated accounts between them and the other parties respectively, a Court of Equity was more competent to take them, and to dispose of the whole case than a Court of Law, and the bill was sustained accordingly.—*Taff Vale Railway Company v. Nixon*, 1 H. L. Cas. 111.

See *Foley v. Hill*, 2 H. L. Cas. 28;

JURISDICTION—continued.

Ranger v. Great Western Railway, 5 H. L. Cas. 72.

16. The Attorney General (after the passing of the statute 5 Vict. c. 5), filed an information in Chancery against the Mayor and Commonalty of London, alleging that the Crown was seized of the bed and soil of the River Thames; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) license to embank parts of the river, and had received fines for such licenses, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licenses might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity:

Held, affirming an order of the Master of the Rolls, that the information was maintainable.—*The Mayor of London v. The Attorney General*, 1 H. L. Cas. 440.

Quere, whether, when an Act of Parliament transfers jurisdiction from one Court to another, or grants an extension of the jurisdiction of an existing Court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein?—*Id.*

17. A testator, by his will and codicils, gave R. A. large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Court, R. A. filed a bill in Chancery, alleging that the testator had executed the last codicil under influence of the residuary legatee, and false representations made at her instance respecting R. A.'s character, and that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument; the bill, therefore, prayed

JURISDICTION—continued.

that the executors or residuary legatee might be declared trustees or trustees for R. A.:

Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter (*dissentientibus* Lord Cottenham, Chancellor, and Lord Langdale, Master of the Rolls), and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court.—*Allen v. M'Pherson*, 1 H. L. Cas. 191.

See *Whicker v. Hunne*, 7 H. L. Cas. 124.

18. A person whose name was upon the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the *Scotch Acts* of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, applied to the Court of Session for an interim interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application:

Held, by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the Court below should be given.—*Fleming v. Newton*, 1 H. L. Cas. 363.

An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.—*Id.*

See *Geils v. Geils*, 3 H. L. Cas. 280.

19. It is the ordinary rule of a Court of Equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a Court of Equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion.—*Ricketts v. Turquand*, 1 H. L. Cas. 472.

See *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Peck v. North Staffordshire*,

JURISDICTION—*continued.*

10 H. L. Cas. 490; *Malcomson v. O'Dea*, 10 H. L. Cas. 593.

20. The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife; so far as they regard an arrangement of property and specific performance of such articles, the Court will not inquire into the cause of separation. — *Wilson v. Wilson*, 1 H. L. Cas. 538.

21. A foreign Sovereign, who is also a *British* subject, coming to *England*, cannot be made responsible in the Courts here for acts done by him in his Sovereign character in his own country:

Held, therefore, that the King of *Hanover*, who was also a *British* subject, and was in *England* exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of State done by him in *Hanover* and elsewhere abroad in virtue of his authority as a Sovereign, and not as a *British* subject. — *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1.

See *Mayor of London v. Cox*, L. R., 2 H. L., 239.

22. A *Scotchman*, by deed duly made in the *Scotch* form, appointed his wife and eight other persons, all domiciled and resident in *Scotland*, to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to *England*, and after residing for three years in various places for the purpose of the health of both, the widow died, recommending the infant to the care of the grandfather, who was then residing in *England*. The grandfather filed a bill in Chancery in the infant's name for the sole purpose of making her a ward of Court, and preventing her removal to *Scotland*. And upon a contest arising between him and the *Scotch* tutors for the guardianship of the infant, the Lord Chancellor made an order in the usual form, referring it to the Master to approve of proper persons to be guardians:

JURISDICTION—*continued.*

Held, by the Lords (affirming that order):—

1. That the *Scotch* testamentary tutors were not testamentary guardians in *England*, according to the Act 12 Car. 2, c. 24.

2. That the Court of Chancery had jurisdiction to appoint guardians, although her domicile and all her property were in *Scotland*.

3. That the Court was bound to appoint guardians to the infant, she being made a ward by the mere filing of the bill; and although the *Scotch* testamentary tutors had the exclusive control of all her property, and were answerable to the *Scotch* Courts only, they had no authority over the infant in *England*, nor power to protect her, nor were entitled by virtue of the deed of appointment, or by intimation law, to be confirmed or appointed her guardians in *England*. (*Diss.* Lord Brougham and Lord Campbell.)

4. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction. — *Johnstone v. Beattie*, 10 Cl. & F. 42.

Quare, whether a bill filed to make an infant a ward of Court, ought not to allege some right or claim of the infant to property within the jurisdiction?—*Id.*

23. The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, nor both combined, can create such a right, it being essentially one of the limitation and of the extension of jurisdiction. — *The Attorney General v. Sillem*, 10 H. L. Cas. 704.
24. The words, "Superior Courts of Common Law at *Westminster*" in the Common Law Procedure Acts, do not include the Revenue side of the Exchequer. — *Id.*
25. In the 26th section of the Queen's Remembrancer's Act (22 & 23 Vict. c. 21), the words "process, practice, and mode of pleading" are not used in the abstract, but with

JURISDICTION—*continued*.

reference to existing Courts; the word "practice," means the rules which guide the mode of proceeding within the walls of the Court itself; and the later words of the section give the Barons the power to "extend, apply, and adapt" to the Revenue side of the Court of Exchequer no more than the "process, practice, and mode of pleading," which were already in use on the plea side of that Court, and these words bear in the second part of the section the same meaning as in the first part of the section.—*The Attorney General v. Sillem*, 10 H. L. Cas. 704.

Held, therefore, that rules, which, by applying to cases on the Revenue side of the Exchequer, the provisions of the Common Law Procedure Act of 1854, respecting appeals on motions for a new trial, gave an appeal in such motions on the Revenue side, were Rules made without Legislative authority, and were consequently void. (*Diss. Lord Cramworth and Lord Wensleydale.*)—*Id.*

Per Lord Cramworth and Lord Wensleydale: The Rules were warranted by the 26th section of the 22 & 23 Vict. c. 21, for they only applied to proceedings on the Revenue side of the Exchequer (as that section authorised), the practice then existing on the plea side, where the right of appeal against a decision on a motion for a new trial had been already, by the 17 & 18 Vict. c. 125, established by the Legislature itself.—*Id.*

Per Lord Wensleydale: The second part of the 26th section of 22 & 23 Vict. c. 21, taken by itself, would allow all the provisions of the Common Law Procedure Acts of 1852 and 1854, to be adapted to the Revenue side of the Exchequer.—*Id.*

If the Rules had been valid in themselves, it would not have been an objection to them that they affected suits then pending.—*Id.*

JURYMAN.

1. A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special jurymen. The name of a town councillor stood on a special jury list after it had been reduced:

JURYMAN—*continued*.

Held, that under the *Irish Jury Act*, 3 & 4 Will. 4, c. 91, he was liable to challenge for this disqualification when about to be sworn.—*Barrett v. Long*, 3 H. L. Cas. 395.

2. The right of challenge against a jurymen is a common-law right, which cannot be taken away except by the express terms of a statute; and *quare*, whether it is taken away by the 3 & 4 Will. 4, c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge?—*Id.*

It is not taken away by the effect of the 3 & 4 Will. 4, c. 91, in respect of a disqualification created since that statute, and where a challenge, in respect of such disqualification, was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced.—*Id.*

LANDED ESTATES COURT. *See* CHANCERY. INCUMBERED ESTATES COURT.

LANDLORD AND TENANT. *See* LIMITATIONS, STATUTE OF.

1. A landlord or lessor, in 1781, by an ejectment for non-payment of rent, entered upon the possession of a widow, tenant for life of a lease for lives renewable for ever, remainder to her children, infants. The children in 1806, long after they came of age, and after the lessor had been in undisputed possession for upwards of 25 years, filed their bill for relief: Held, by the House of Lords, reversing a decree of the *Irish Court of Exchequer*, that there was no ground whatever in this case for interference in equity.—*Baker v. Morgans*, 2 Dow, 526.

Sentientibus, Lords *Eldon* and *Redesdale*, that the proper proceeding, if any could be adopted, would be a proceeding at law; that as to any irregularity in the proceedings in the ejectment under which the lessor was put in possession, that was a question for the consideration of the Court of King's Bench; and that the construction attempted to be

LANDLORD AND TENANT—*continued*.

put on the statute giving the remedy by ejectment to the landlord for non-payment of rent, viz., that rights of infants in remainder were saved, would vary the rights of the landlord, and was inconsistent with the effect of the entry for non-payment of rent, which was to re-vest the property in the landlord, in the same manner as before the lease had been granted.—*Baker v. Morgans*, 2 Dow, 526.

2. A. became tenant of a house under B. The tenant was, by the lease, bound during the term to uphold the house as habitable; the landlord covenanted that the tenant should enjoy during the term. The house was accidentally destroyed by fire :

Held, that the landlord could not be compelled, under his covenant, to rebuild.—*Bayne v. Walker*, 3 Dow, 233.

Per Lord Redesdale: The meaning of the maxim *res suo perit domino* is, as applied to accidents, that all shall bear the loss according to their interests.—*Id.*

3. Contract for the purchase of 100 acres of arable and 700 acres of pasture land, the purchaser's entry to commence at Whit Sunday 1807, and he is to have a right "to the crop and year 1807;" and a disposition assigning "the rent for crop and year 1807." The farm at the time of the sale was in possession of a tenant at a rent, payable one half at Candlemas, the other half at Lammas in each year. The purchaser entered on the day named :

Held, that by the law of Scotland the seller and not the purchaser was entitled to the rent payable at these two terms in the year 1807.—*Shepard v. Watherston*, 5 Dow, 278.

4. *Quare*, whether a landlord is, by accepting offers, made by his tenant's agent, to pay overdue rent if the landlord will assign to the agent a sequestration issued against the lands of the tenant, liable to compensate the tenant for loss suffered by him from the sequestration not being so assigned.—*Gordon v. Graham*, 8 Cl & F. 107.

5. It is not in the power of a tenant, by

LANDLORD AND TENANT—*continued*.

any act of his own, to alter the relation in which he stands to his landlord.—*Archbold v. Scully*, 9 H. L. Cas. 360.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42nd section of 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years.—*Id.*

The 24th section of that Act only bars equitable rights so far as they would have been barred if they had been legal rights.—*Id.*

LANDS CLAUSES ACT. *See* HEADINGS OF CLAUSES.LAND TAX. *See* ACQUIESCENCE.LEASE FOR LIVES. *See* AFFIDAVIT. IRISH TENANTRY ACTS, 2. POWER. SPECIFIC PERFORMANCE.

1. An agreement to grant a lease for lives must be understood to mean lives in existence at the time.—*Wheeler v. D'Eslerre*, 2 Dow, 359.
2. Demand for fines made under the Tenantry Act on 6th October, 1800 (after all the lives had dropped—one in 1789, another in 1791, and the last in August, 1800, and repeated applications since 1798 for payment), and no tender till March, 1801, after ejectment brought by the landlord :

Held, that the tenant had forfeited his right to renewal; the offer to pay and renew being considered, under the circumstances, as delayed for an unreasonable time.—*Jackson v. Saunders*, 2 Dow, 137.

Sentiente, Lord Eldon, that the delay after the demand was unreasonable, though there had been no prior neglect, and (*concurrente* Lord Redesdale) that no particular formality in the demand was necessary; that it need not be of a specific sum; that it need not be in writing; that no special power was necessary to authorise an agent to make the demand and receive the fines; that a subsequent demand was no waiver of a prior demand, unless the terms of the subsequent demand were complied with; and that, in considering

LEASE FOR LIVES—*continued.*

what was a reasonable time after demand, prior applications and circumstances were to be taken into account.—*Jackson v. Saunders*, 2 Dow, 437.

Dubitante Lord Eldon, whether, where a tenant was taken bound, on the dropping of any of the lives, to pay a fine and nominate another life, or, in case of neglect, to pay interest on the fine, the meaning could be, that the tenant should have the option to postpone renewal till the last life was about to expire. *Sentiente*, if such was the meaning, that it was not a covenant which equity would specifically execute.—*Id.*

See *Barrett v. Burke*, 5 Dow, 1; *Galbraith v. Cooper*, 8 H. L. Cas. 315, 322; *Aldworth v. Allen*, 11 H. L. Cas. 555.

3. Where, on the dropping of one of the lives, in a lease for three lives, with covenant for perpetual renewals, repeated applications were made to the tenant to renew according to his covenant, particularly in 1788 and 1796, and he made no offer to renew till 1804 or 1805, when some conversations took place respecting a renewal upon the tenant's relinquishing a suit in equity which he was carrying on against his landlord, but which conversations ended without anything being done, and the landlord refused to renew; the House of Lords, reversing a decision of the Irish Court of Exchequer, held, that the tenant's right to a renewal was forfeited, and that the case was not one where relief could be granted under the Tenantry Act, 19 & 20 Geo. 3, c. 30.

Sentientibus Lords Eldon and Redesdale, that relief under the Act is to be confined to cases of simple, innocent neglect; that a simple demand (without any menace of forfeiture, &c.), followed by neglect for an unreasonable time, is sufficient to conclude the tenant, and bar his relief; that where there have been several demands, if the terms of the last demand are not complied with, the original demand remains the foundation of the right; that inability to pay is no excuse; that the character of a general agent is sufficient to

LEASE FOR LIVES—*continued.*

authorise one to demand and receive the fines; and that if there had been a consent to waive the forfeiture connected with the relinquishing the suit, the transaction would have been a new agreement within the Statute of Frauds.

Dubitante Lord Eldon, whether, if there had been a waiver of the right connected with another transaction, it was competent to take one part of the bargain, and act upon it as if the other part had been out of the question. Also whether, when the landlord acquired a right to the forfeiture, the agent could pass from it without a special authority.

Semble, that in these cases equity in Ireland relieves against the strongest negative clauses in the contract.—*Mountmorris (Earl of) v. White*, 2 Dow, 459.

See *Galbraith v. Cooper*, 8 H. L. Cas. 315; *Aldworth v. Allen*, 11 H. L. Cas. 555.

4. Lessee of a church lease, made about 150 years ago, sub-leases with covenant for renewal as long as he could renew the original lease; the *sub-lessees* covenanting to pay double the rent that might be demanded by the Dean and Chapter, and to pay 300*l.* of the fine; the immediate lessee covenanting "to make all proper applications, and use all proper endeavours for the renewal of the lease." Renewals at the old rent, and increasing fines, till 1796; when the *sub-lessees* agreed to pay a greater proportion of the fine, on having an addition to their term and clause introduced into the contract, that they should have the option to reject the renewal in case the rent should be too much advanced. *Immediate lessee* endeavours to procure a renewal at a small fine and increase of rent, but the Court below, on bill by the *sub-lessees*, decreed performance of the covenant, by renewal for a large fine at the old rent, the Dean and Chapter being willing to renew in that way, on the ground, apparently, that such was the true intent and meaning of the parties; it being conceived, that the option reserved to the *sub-lessees*, to reject

LEASE FOR LIVES—continued.

the renewal, was intended to guard against the effect of an increase of rent, if insisted upon by the Dean and Chapter, without its being left to the *immediate lessees* to endeavour to procure a renewal at an increase of rent and small fine, if he could. This decision affirmed on appeal.—*Hone v. Davis*, 2 Dow, 546.

5. *A.*, in 1713, leases to *B.* for three lives, at a rent of 50*l.*, renewable for ever on payment of a fine of 25*l.* on the dropping of each life. *B.* made a similar lease to *C.*, at a rent of 102*l.* 10*s.*, with a covenant to renew for ever on payment of the fine previously settled, and covenanted at the same time that he would regularly renew with *A.* *C.* paid his rent and fines, and renewed regularly with *B.*, but *B.* did not regularly renew with *A.* In 1793, *A.* accepted some money from *C.* towards the discharge of the fines due from *B.*, but made a demand for the whole of those fines, a demand with which *C.* did not comply. A formal demand was made by *A.*'s representative to *C.*, in 1799. This was not attended to for nine months, and then an illusory tender was made. It was not accepted :

Held, that under these circumstances *C.* had no claim in equity to enforce a renewal.—*Barrett v. Burke*, 5 Dow, 1.

Per Lord Redesdale : A formal demand is not necessary under the Irish Tenantry Acts.—*Id.*

See *Galbraith v. Cooper*, 8 H. L. Cas. 315.

6. An agreement in a lease for lives, "that, upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns," does not amount to a covenant for perpetual renewal.—*Smyth v. Nangle*, 7 Cl. & F. 405.

7. A will, devising real estate, gave a power to the devisees for life to demise and lease the same for any term not exceeding 21 years in possession, "so as upon every such lease

LEASE FOR LIVES—continued.

there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money, by way of fine or income, for or in respect of such lease." The first devisee for life, in exercise of this power, made a lease for 21 years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, on the 6th of April and 11th of October in every year, *except the last half year's rent, which was thereby reserved and agreed to be paid on the 1st of August next, before the determination of the said term :*

Held, by the Lords (concurring in the opinion of a majority of the judges, and reversing the judgment of the Exchequer Chamber), that the lease was a valid execution of the power.—*Rutland v. Wythe*, 10 Cl. & F. 419.

8. By lease granted in 1719 the lessor demised for three lives, renewable for ever, all that part of the townland of *B.*, containing 509 acres, arable, meadow, and pasture, bounded on the south by *D.*, on the north and east with *L. N.*, and on the west with *T.*'s and *W.*'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone, and coal, and all royalties, and all timber above and underground. There were several renewals of the lease, in the same terms as to the contents and boundaries of the demised premises :

Held, by the Lords, affirming judgments of the Courts in *Ireland*, that 400 acres of bog, and land reclaimed from bog, which were situated within the ambit of the specified boundaries, passed under the lease, and the renewals thereof, in addition to the 509 acres arable, meadow, and pasture.—*Jack, Lessee of Dawson v. McIntyre*, 12 Cl. & F. 151.

9. *S.*, on the 5th January, 1746, being tenant in fee-simple of lands in *Tipperary*, executed an indenture, which was, two days afterwards, registered under the *Irish Registration Acts*. The memorial represented that *S.*

LEASE FOR LIVES—*continued*.

had, by the indenture, demised, or agreed to demise, these lands to *C.* for three lives, therein-named, with "a clause of renewal after the expiration of said lives thereinbefore mentioned," provided that *C.*, his heirs, &c., should, "within six months from the death of the last of said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives for ever." The memorial was signed by *C.* alone, and he registered it. In February, 1750, *S.* executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March, 1750, he executed a lease to *C.*, in which the indenture of 1746 was recited, and in consequence of some changes in the lands, a change was made in the rent. The lease recited the indenture as a demise to *C.* for three lives and the longest liver of them, with a covenant to "renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives; and *S.* covenanted that, "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon *C.*, his heirs, &c., paying "the sum of 11*l.* 7*s.* 6*d.* above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "*S.* and his heirs," &c., would add the life so nominated; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease or thereafter to be nominated." Renewals had, from time to time, been made by the successors of *S.* in the estate, sometimes after proceedings in Chancery to compel the same, sometimes without such proceedings; but at length, in 1845, *G.*, the descendant of *S.*, refused to renew, and a bill was filed against him by *B.*, who had become possessed of *C.*'s lease. The bill prayed for a renewal according to the lease, which *B.* alleged to have

LEASE FOR LIVES—*continued*.

been made in conformity with, and under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture and those contained in the lease:

Held, affirming the judgment of the Court below, that the plaintiff was entitled to the renewal as prayed; that the memorial was properly admitted as secondary evidence of the indenture; that that indenture was to be treated as an original lease, containing a covenant under the obligation of which the lease of 1750 was executed; that the obligation entered into in 1746 being by the tenant in fee-simple, his performance of it in 1750 was valid, although he was then only tenant for life; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been proved, evidence of the construction which the parties interested had put upon it.—*Sadlier v. Biggs*, 4 H. L. Cas. 435.

Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in *Ireland* ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January, 1746:

Per Lord St. Leonards: That order was authorised by the *Irish* statute 11 *Anne*, c. 3.—*Id.*

10. Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:

LEASE FOR LIVES—*continued*.

Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease.—*Archbold v. Scully*, 9 H. L. Cas. 360

LEGACY. *See* ELECTION. WILL.

1. *J. S.* devises to his son *T. S.* certain real estates specifically, and charged with specific burdens; and bequeaths certain pecuniary legacies, and makes his real and personal estates liable to pay the legacies; and makes *T. S.* his residuary devisee and legatee, and sole executor:

Held, by the Lords, that the real estate specifically devised to *T. S.* were not liable to contribute to the payment of the pecuniary legacies.—*Spong v. Spong*, 1 Dow & C. 365.

2. Testator, living in *Jamaica*, gave, by his will, legacies of 1000*l.* and 1000*l.* to *A.*, and of 500*l.* each to *B.* and *C.*, who also resided there, and directed that they should be paid out of the money due to him upon bonds given by the said *A.* The testator afterwards went to *Scotland*, where he died in 1790. The legatees left *Jamaica* in the same year. Probate of the will was granted in 1791, and the bonds due from *A.* were put in suit by the executor. In 1818 the legacies given to *B.* and *C.* were purchased by *A.*, their near relative, for 25*l.* each. In 1821, administration with the will of the testator annexed was, for the first time, taken out in this country, and in that year *A.* filed his bill, claiming payment of these legacies:

Held, that a Court of Equity might, after such a lapse of time, consider all the circumstances of the case, and presume the legacies to be satisfied.—*Campbell v. Sandford*, 2 Cl. & F. 429.

3. A testator bequeaths to trustees a sum of 15,000*l.* in the Three per Cent. Consols, to be deemed a legacy of quantity, and to be due at his death as if the same was a specific legacy; and he directed that, if he should not die possessed of Three per Cent. Consols sufficient to satisfy the said sum, his executors should,

LEGACY—*continued*.

within two months after his decease, purchase so much Consols as should make up the deficiency, or full amount thereof, as the case might require; and he created a term in his real estates, one trust of which was to raise the full amount or deficiency of the said sum of Consols, in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was dated in 1832; the testator died in 1835, leaving only 3000*l.* Three per Cent. Consols, which had been purchased in 1834. He had in 1824 sold out 12,000*l.* Consols, which then stood in his name, and paid the produce to his brother upon mortgage of freehold estates, subject to redemption, by re-transferring or replacing on request 12,000*l.* Consols into the name of the testator or his executors, and on payment of interest equal to the dividends until replaced:

Held (affirming decrees of the Vice Chancellor), that the 12,000*l.* Consols secured by the mortgage to be replaced, were well bequeathed to make up the legacy of 15,000*l.* Three per Cent. Consols.—*Collison v. Curling*, 9 Cl. & F. 88.

4. Where a legacy is given in each of two different instruments, the testator must, *primâ facie*, be understood to have meant to give two separate legacies; but there may be circumstances to rebut that presumption.—*Russell v. Dickson*, 4 H. L. Cas. 293.

LEGACY DUTY. *See* SUCCESSION DUTY.

1. A testator born in *Scotland*, but having for many years resided in *India* died there, leaving real and personal property in *India*, but no assets in *England*. By his will and testamentary papers, all executed in *India*, he left the whole of his property, in equal divisions, to his four natural children, or the survivors of them and their heirs, subject to some small legacies and annuities. His executors, who were in *India* before and at the time of his death, have obtained an *Indian* probate, paid the debts and bequests, and got in the testator's estate, and converted the principal part thereof into money, which they

LEGACY DUTY—*continued.*

sent to their bankers in *England*, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in *England* to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant General of the Court of Chancery, and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of the Crown for the legacy duty on the residuary fund:

Held, by the House of Lords, affirming the judgments of the Courts below, that legacy duty was not payable on the legacies, annuities, or shares of the residue bequeathed.—*The Attorney General v. Forbes*, 2 Cl. & F. 48.

See *Thomson v. The Advocate General*, 12 Cl. & F. 1; *The Attorney General v. Napier*, 6 Exch. 217; *The Attorney General v. Brunning*, 4 H. & N. 94, reversed 8 H. L. Cas. 243.

2. A testator devised, by two testamentary papers, his real and personal estate to trustees. In the first paper he declared the trusts, and created a power of sale in the following terms: "To sell and dispose of the lands, mills, teinds, woods, fishings, messuages, &c., hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit." And he granted full power to convey. The paper then went on thus: "Declaring always, &c., that my said trustees shall by their acceptance hereof be bound and obliged after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts." By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and moveable estates to trustees on the trusts therein mentioned, and "amongst others my trustees are required to turn my means and effects, thereby conveyed in trust into money;" and he gave direc-

LEGACY DUTY—*continued.*

tions accordingly. He farther directed, that in case he should die leaving an heir of his body, his trustees should employ the trust funds for the use of such heir, and that as soon as such heir should attain majority or be married, the trustees "denude themselves of the whole trusts and funds" in favour of the heir, but to return to the trustees in case of failure of heirs of his body without disposing of the same:

Held, that the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death; and held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.—*Williamson v. The Lord Advocate*, 10 Cl. & F. 1.

See *Thomson v. The Advocate General*, 12 Cl. & F. 1.

3. *J. R.* by will directed his real estates to be sold and converted into personality; and after giving certain legacies, he thereby vested the residue in trustees, for the use of his daughter *J. A. P.* for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will; and directed, that in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees in trust for the next of kin of *D. R.* This power was exercised by *J. A. P.* by her will partly in favour of the next of kin of *D. R.*, and partly in favour of other persons:

Held, affirming the decree of the Master of the Rolls, first, that she must be considered to have had, notwithstanding the special exclusions in her father's will, an absolute power of appointment within the meaning of the 36 *Geo. 3*, c. 52; and that consequently legacy duty was payable by her appointees, upon the bequests made by her, as being, un-

LEGACY DUTY—*continued.*

der the 7th section, bequests made by her out of personal estate, which she had the power of disposing of; second, that this property, though subject to her power of disposal, was not so strictly her own property as to render it, under the 18th section, liable to probate duty under her will, as property which she had died possessed of, or entitled to.—*Drake v. The Attorney General*, 10 Cl. & F. 257.

See *Attorney General v. Brunning*, 8 H. L. Cas. 246.

4. Personal property having no *situs* of its own, follows the domicile of its owner. The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty. A *British* born subject died, domiciled in a *British* colony. At the time of his death he was possessed of personal property, locally situate in *Scotland*. Probate of his will was taken out in *Scotland*, for the purpose of there administering this property, and out of the fund thus obtained by the executor, legacies were paid to legatees residing in *Scotland*:

Held, reversing a judgment of the Court of Exchequer in *Scotland*, that legacy duty was not payable in respect of these legacies.—*Thomson v. The Advocate General*, 12 Cl. & F. 1.

LEGAL TITLE.

When there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate, in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts and legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title.—*Colyer v. Finch*, 5 H. L. Cas. 905.

LEGITIM.

An advance of a marriage portion to a daughter does not, of itself, by the law of *Scotland*, bar her claim to

LEGITIM—*continued.*

legitim, which cannot be barred by implication.—*Breadalbane (Marquis) v. Chandos (Marquis)*, 4 Cl. & F. 43.

Therefore, a marriage contract in which the father of the lady agreed to pay a certain sum of money as the "portion or fortune of his daughter," and which then went on to describe how the sum should be paid, partly in his lifetime, and partly out of his estate after his death, was held not to be capable, without more, of barring her claim to *legitim*.—*Id.*

An heir of entail, who is not so by exclusive destination, must collate the real estate of which he has, as such heir, become possessed, before he can claim his share of the *legitim* of the last holder in tail, to whom he is both heir and next of kin.—*Id.*

LEGITIMACY. See HUSBAND AND WIFE. MARRIAGE.

1. A child born *Stante Matrimonio* must be presumed to be legitimate, although some months before its birth proceedings had been instituted by the husband for a divorce, on the ground of adultery, and a decree for divorce was pronounced in the suit, after its birth.—*Routledge v. Carruthers*, 4 Dow, 392.
2. *Quære*, whether a child born in *Scotland*, of parents domiciled there, who at the time of its birth were not married, but who afterwards intermarried in *Scotland* (neither having in the meantime married any other person), can take, as heir, lands of his father in *England*? *Semble*, that he cannot.—*Doe d. Birtchistle v. Vardill*, 2 Cl. & F. 571.

See *Brook v. Brook*, 9 H. L. Cas. 193.

3. Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent:

Held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, may be rebutted, not

LEGITIMACY—continued.

only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct, such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will.—*Morris v. Davies*, 5 Cl. & F. 163.

See *Woodmason v. Doyme*, 10 Cl. & F. 22; *Piers v. Piers*, 2 H. L. Cas. 331.

4. A Scotch marriage can legitimate the previously born children of the married persons so as to enable them to succeed as heirs to real estate in Scotland. The child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicile of the father was and continued throughout to be Scotch. Neither the place of the marriage, nor the place of the birth of the child will, under such circumstances, affect the status of the child.—*Dalhousie v. M'Douall*, 7 Cl. & F. 817.

In matters to be determined by the domicile of the parties, it is a principle of law that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile.—*Id.*

In order to acquire a domicile, there must be actual residence in the place chosen, which must be the principal and permanent residence of the party.—*Id.*

By marriage, the domicile of the husband becomes that of the wife.—*Id.*

In 1796 a Scotch gentleman of fortune came with his regiment into England, bringing with him a young Scotch-

LEGITIMACY—continued.

woman then in a state of pregnancy. Her child was born in England, and he gave the usual bond to indemnify the parish against the chargeability of the infant. The young woman continued to reside with him and had other children by him, and in each instance a similar bond was given. His regiment was disbanded, and he was then returned to Parliament as member for a Scotch county. He took a house for the purpose of the children's education in Penrith in Cumberland, and when not in London attending his Parliamentary duties, was frequently staying at Penrith. In 1808 he executed a marriage contract, in which he was described as "of Logan" (Scotland), of the one part; and she was described as "M. R." (her maiden name), "residing at Penrith, Cumberland, South Britain, of the other part." No other ceremony of marriage took place, but he shortly afterwards carried her to Scotland and introduced her and the children as his wife and children:

Held, that he had not lost his Scotch domicile; that his marriage was a Scotch marriage, and that his children were consequently entitled to succeed as heirs to Scotch estate.—*Dalhousie v. M'Douall*, 7 Cl. & F. 817.

See *Whicker v. Hume*, 7 H. L. Cas. 124.

5. A Scotch gentleman of rank and fortune left Scotland in 1794, and came on a visit to London. In the course of that year he became acquainted with an English lady. In 1795 he took lodgings for her in London, where, in 1796, a child, the fruit of their intercourse, was born. He then took a house on lease and furnished it, and continued to reside in that house with her till 1801, unmarried. In September of that year he married her in an English church. In 1802 he returned to Scotland, taking with him his wife and child, and settled himself in his patrimonial mansion. During the whole period of his residence in London, he had been accustomed to write letters to Scotland, declaring from time to time his immediate intention

LEGITIMACY—continued.

to return, and desiring things to be done which could only be necessary on that account:

Held, that he had not lost his *Scotch* domicile, and therefore that his marriage was in all respects a *Scotch* marriage, and his child capable of succeeding as his lawful heir to entailed estates.—*Munro v. Munro*, 7 Cl. & F. 842.

See *Whicker v. Hume*, 7 H. L. Cas. 124; *Moorhouse v. Lord*, 10 H. L. Cas. 272.

6. A., a *Scotchman*, married in *Scotland* and went abroad. His wife cohabited with C., and had children by him. To make such children legitimate, it was held necessary for those who asserted their legitimacy to prove either a legal origin of the cohabitation, or a change in the nature of it, after the death of A. had become known to all the world. The mere fact that after A.'s death C. and the woman continued to live together was not sufficient for that purpose. Under such circumstances the children were held illegitimate, though born after the date of A.'s death.—*Lapsley v. Grierson*, 1 H. L. Cas. 498.

Quere, C. and B. live together as man and wife, in a *bonâ fide* belief that A., to whom B. had been lawfully married, was dead; in fact he was alive; will his subsequent death, during the continuance of their cohabitation, confer on it, according to the law of *Scotland*, the character of a legal marriage?—*Id.*

7. The illegitimacy of a child born of a married woman, is established beyond all dispute by evidence of her living in adultery at the time when the child was begotten, and of the husband then residing in another part of the kingdom, so as to make access impossible.—*The Barony of Saye and Sele*, 1 H. L. Cas. 507.

LIBEL. See DEFAMATION.

1. The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the *Scotch* Acts of 1681 and 1696, and the 12 *Geo.*

LIBEL—continued.

3, c. 72, and 23 *Geo.* 3, c. 18, is a public document to which everybody has a right of access, and the publication of which in a printed paper, does not constitute a libellous publication.—*Fleming v. Newton*, 1 H. L. Cas. 363.

A person whose name was upon this register, applied to the Court of Session for an interim interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application, but such interdict was held to be the subject of appeal to this House, and it was ordered to be recalled.—*Id.*

2. Though defamatory matter may appear to apply only to a class of individuals, yet if the descriptions in such matter are capable of being, by *innuendo*, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.—*Le Fanu v. Malcomson*, 1 H. L. Cas. 637.

In such a case the *innuendo* does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does apply.—*Id.*

Therefore, after verdict, a declaration which recited that the plaintiff was the owner of a factory in *Ireland*, and charged that the defendant published of him, and of the said factory, a libel, imputing that "in some of the *Irish* factories (meaning thoroughly the plaintiff's factory)," cruelties were practised, though that was no allegation otherwise connecting the libel with the plaintiff, was held good.—*Id.*

A. and B. may join in action for libel containing imputations injurious to a trade carried on by them jointly as partners.—*Id.*

LIEN. See BANK AND BANKERS. CONTRACT. DELIVERY ORDER.

1. The general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negocia-

LIEN—continued.

bility of bills of exchange.—*Brandao v. Barnett*, 12 CL & F. 787.

A banker's lien does not arise on securities deposited with him for a special purpose, as when Exchequer bills are placed in his hands to get the interest on them, and to get them exchanged for new bills. Such a special purpose is inconsistent with the existence of a general lien.—*Id.*

Where a person who is, in reality, the agent of another, deposits Exchequer bills with his own bankers, without informing them whose property these bills are, the bankers may be held to consider these bills as the depositor's property, and to hold them as security for any money due to themselves from him, if the mode of deposit, or the circumstances attending it, give them a lien on the bills as against him.—*Id.*

A. was the London agent of B., a Portuguese merchant, and in that character purchased Exchequer bills for him, received interest on them, and at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C. as his banker, and at C.'s banking house had several tin boxes, in which he deposited these Exchequer bills, and of which he kept the keys. On the 1st December, 1836, A. took out of a tin box several Exchequer bills, which he delivered to C., requesting C. to get the interest due on them, and to get the Exchequer bills exchanged for others. C. did so. Before A. came to take back the Exchequer bills, acceptances of his, beyond the amount of the cash credit account, were presented at the bank and paid. A. afterwards became bankrupt:

Held, that C. had not a lien on the Exchequer bills in his hands for the balance due to him on A.'s account.—*Id.*

See *Jeffries v. The Agra Bank*, L. R., 2 Eq., 674; *Id.*, L. R., 2 Ch. App., 393.

2. A person who has a lien upon a chattel cannot, if he keeps the chattel to enforce payment of that lien, add to the amount for which the lien exists, a charge for keeping the chattel till

LIEN—continued.

the debt is paid.—*Somes v. The British Empire Shipping Company*, 8 H. L. Cas. 338.

Where such a charge is made, and the owner of the chattel gives notice that he will pay it, but that he protests against the payment, and will seek to recover it back again, he may maintain money had and received for such a purpose.—*Id.*

A shipowner desired to have his ship repaired. On asking a shipwright for an estimate he received one, the last item of which was "The cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired; when finished, the account was sent in, with this item included. No objection was made to any item, but time was required for payment. The shipwright who claimed and enforced his lien on the ship for payment, recommended the removal of the ship, saying that it was unnecessarily occupying his dock, that he had other ships waiting to go in, and that, from a certain day, he should charge 21*l.* a day for the use of his dock:

Held, that these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, and that (having paid it under protest) the shipowner might maintain money had and received to recover it back.—*Id.*

LIFE INSURANCE. See INSURANCE.

1. *H. F.* insured his life in January, 1815, and paid premiums regularly till 1824. In January, 1815 *H. F.* committed a felony, for which he was convicted in October, and hanged in November, 1824. A bill was filed in 1825 by the representative of *H. F.*, claiming under him and in his right, for payment of the sum alleged to be due under the insurance:

Held (reversing the decree of the Master of the Rolls), that by the general policy of the law, the insurance became void as to those claiming under and in right of *H. F.*, in consequence of the death being occasioned by her own criminal act.—*Amicable Assurance Society v. Boland*, 2 Dow & C. 1.

LIFE INSURANCE—*continued.*

See *Dufaur v. The Professional Life Assurance Company*, 25 Beav. 599.

LIGHTS.

The right to ancient lights now depends on statute 2 & 3 Will. 4, c. 71, and so does not require, and ought not to be rested on, any prescription or fiction of a license.—*Tapling v. Jones*, 11 H. L. Cas. 290.

Therefore, as the statute declares it to be absolute and indefeasible, it cannot be lost by a temporary intermission not amounting to abandonment, nor can it be forfeited by any attempt to extend the right.—*Id.*

"The right to obstruct a new light" is an unmeaning expression. The right is that of a man to use his own land, though his so using it may obstruct the light received through the window of an adjoining house.—*Id.*

Invasion of privacy by opening a window which overlooks another man's grounds is not recognised by law as a wrongful act.—*Id.*

The opening of a new window being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another.—*Id.*

Consequently, where there was an ancient light, and then others were added, and an obstruction was raised against the added lights, which from their position could not be obstructed without obstructing the ancient light, such obstruction was illegal.—*Id.*

Renshaw v. Bean, 18 Q. B. 112, and *Hutchinson v. Copestake*, 8 Com. Ben., N. S., 102; and in error, 9 Com. Ben., N. S., 863, overruled.

LIMITATIONS IN DEEDS AND SETTLEMENTS. See DEEDS.

LIMITATIONS (STATUTE OF). See PRESCRIPTION, 17. BOND.

1. *King*, son-in-law and agent of *A. Gore*, is in the habit of making payments in respect of *Gore's* debts, sometimes with money furnished for the purpose by *Gore*, sometimes out of his

LIMITATIONS (STATUTE OF)—*continued.*

own funds. *King* pays 400*l.* in 1761, and 2000*l.* in 1764, in respect of bond debts of *Gore*, who died in 1781, leaving *King* his executor. No claim made by *King* against *A. Gore* in his lifetime, nor against his estate afterwards, till 1819, in respect of these sums. Presumed, that the payments were made out of the money of *A. Gore*, and the claim of *King* barred by lapse of time.—*Lorton (Lord) v. Gore*, 1 Dow & C. 190.

2. The assignee in possession of an equitable life estate from tenant for life, without impeachment of waste, holds over after the death of the tenant for life against the trustee holding the legal estate both for tenant for life and remainder-men; his adverse possession as against the trustee does not commence till the death of the tenant for life, and till then the Statute of Limitations does not begin to run.—*Fausset v. Carpenter*, 2 Dow & C. 232.
3. A debt which, at the death of the testator, is not barred by the Statute of Limitations, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate; nor will the operation of the statute be prevented, though the testator erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it.—*Scott v. Jones*, 4 Cl. & F. 382.

An executor's advertisement to creditors, to send in an account of their claims for examination, does not amount to a promise sufficient to revive a debt already barred by the Statute of Limitations.—*Id.*

See *O'Connor v. Haslam*, 5 H. L. Cas. 170.

4. To a bill filed for tithes against occupiers of lands in July, 1833, the owner was made a defendant by amendment in January, 1835.
- Quære*, whether he was defendant to a suit commenced within the time limited by the Act 2 & 3 Will. 4, c. 100, s. 3, that is, within a year from the 7th of August, 1832?—*Plowden v. Thorpe*, 7 Cl. & F. 137.

LIMITATIONS (STATUTE OF)—*continued.*

5. Where a creditor of a firm in *India* died there before his right of action was barred by lapse of time, and his personal representative in *Scotland* brought an action there against a partner of the firm 23 years after the creditor's death :

Held, that the *English* Statute of Limitations did not take effect, the action having been brought within six years after *English* probate or letters of administration were taken out to the deceased creditor. — *Fergusson v. Fyffe*, 8 Cl. & F. 121.

6. Length of time is no bar to a claim to a dignity, yet the absence of assertion of right by many persons may raise a presumption against their descendants unless satisfactorily accounted for. — *Hastings' Peerage*, 8 Cl. & F. 144.

7. By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage, to be vested at 21, or marriage, and in case none should attain that age or marry, then in trust for &c. ; there was a daughter who married, and had a child, but died before her parents :

Held, that the child of the daughter was not excluded from taking under the ultimate limitation. — *Wilby v. Mangles*, 10 Cl. & F. 215.

8. A bill for an account of tithes was filed against five defendants, before the expiration of the time limited by the 2 & 3 *Will.* 4, c. 100, s. 3, and after the expiration of that time was amended, under orders of the Court, and four other persons were introduced as defendants :

Held, that the suit as against these latter defendants must be taken to have commenced at the date at which they were actually introduced into the bill ; that they could not, by relation backwards, be treated as defendants to the original bill, and that they were consequently entitled to the protection of the provisions of the statute. — *Byron v. Cooper*, 11 Cl. & F. 556.

So the bill as against them was ordered to be dismissed with costs—*Id.*

LIMITATIONS (STATUTE OF)—*continued.*

8. An estate being limited to the use of *A.* and his wife, and the heirs of their bodies, with remainder to *A.* in fee, and *A.* having died, leaving his widow and *G.*, an only son, and *L.* and *H.*, only daughters ; the widow, in 1735, by deed-poll, in consideration of an annuity granted to her by her son *G.*, and of natural affection, "granted, surrendered, and yielded up" the estate to him in fee ; she afterwards, during her life, suffered a recovery. She died in 1767. *G.* died without issue, in 1779, having devised the estates to trustees to secure annuity to *B.*, the only son of his sister *L.* (then dead), and subject thereto, to *W.*, eldest son of *B.*, for his life, with remainder to *B.*'s second son. In 1790 *W.*, on his father's death, entered into possession of the whole estate, claiming under the will of *G.*, and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety thereof to mortgagees in fee. In 1818, *M.*, the descendant of *H.* the other co-parcener, suffered a recovery of the other moiety, which, it was declared, should enure (subject to the trusts of a term) to the use of *W.*'s mortgagees :

Held (by the Lords, affirming a judgment of the Court of Exchequer Chamber),

1. That the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee determinable by the entry of the issue in tail :

2. That this base fee did not, on the widow's death become merged in the reversion in fee in *G.*, as the estate tail subsisted as an intermediate estate :

3. That although *G.*, being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to anyone until his death, and therefore the period of 20 years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death (1779), and not from the death of his mother (1767), and that *W.*'s entry (in 1790) was not barred by lapse of time :

LIMITATIONS (STATUTE OF)—*continued*.

4. That although *W.* entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted, as to his moiety, to the original estate tail which was barred by the recovery in 1818; and,

5. That the entry and remitter of *W.* did not operate to remit his coparcener to the other moiety of the estate.—*Doe d. Daniel v. Woodroffe*, 2 H. L. Cas. 811.

9. *A.*, who had a life interest in certain estates, gave a bond to a creditor, and a warrant of attorney to confess judgment for its amount. No judgment was entered up. *A.* died within three years of the date of the bond, leaving no assets, real or personal. *B.*, his son, the first tenant in tail of the estates, entered into possession, and expressed in letters to the creditor a wish to pay his father's debts, but would not give any security for them. *B.* made a will, in which, reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said, "And in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father, *A.*, which shall remain unpaid at the time of my decease, upon all my real estates wheresoever," &c. He then directed his trustees to stand seised of all his estates, "subject in manner aforesaid to the payment of all my just debts, and to the debts of my father." *B.* survived his father many years. The obligee of the bond filed a charge thereof against the trustees under the son's will:

Held, that the debts of the father, which were not barred by the Statute of Limitations at the death of the father, were charges on the real estates of the son.—*O'Connor v. Haslam*, 5 H. L. Cas. 170.

10. Charities are trusts, and are as such within the operation of 3 & 4 Will. 4, c. 27.—*St. Mary Magdalen College*

LIMITATIONS (STATUTE OF)—*continued*.

v. The Attorney General, 6 H. L. Cas. 189.

The 1st section of the statute extends the word "person" to a class of persons as well as individuals. The poor of a parish are a class of persons within the meaning of that section.—*Id.*

Where the Attorney General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred.—*Id.*

11. In a suit in which there was an express trust of a charge on land, it was held (*per Lord Wensleydale*) that the Statute of Limitations, 3 & 4 Will. 4, c. 27, did not operate as a bar, an express trust of a charge upon land being, by the true construction of that statute, as much saved from its operation as an express trust of the land itself.—*Burrows v. Gore*, 6 H. L. Cas. 907.

Held also, that, under the circumstances of that case, the rights of certain *cestuis que trustent* did not arise till a certain period, so that they were not affected by the statutes.—*Id.*

12. *Semble*, that the 40th section of the 3 & 4 Will. 4, c. 27, applies to legacies charged on land.—*Bullock v. Downes*, 9 H. L. Cas. 1.

13. So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42nd section of 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years.—*Archbold v. Scully*, 9 H. L. Cas. 360.

The 24th section of that statute only bars equitable rights, so far as they would have been barred if they had been legal rights.—*Id.*

14. The right of a person to the support of the land immediately around his houses is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with he has no

LIMITATIONS (STATUTE OF)—*continued*.

legal ground of complaint, although, in fact, something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property.—*Backhouse v. Bonomi*, 9 H. L. Cas. 503.

A. was the owner of certain houses standing on land which was surrounded by the lands of B., C., and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C., and D. sank in; and after more than six years' interval their sinking occasioned an injury to the houses of A.:

Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the Statute of Limitations.—*Id.*

15. An election (as to estates) gave a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made.—*Spread v. Morgan*, 11 H. L. Cas. 588.

LIS MOTA.

A controversy in a family, though not at that moment the subject of a suit, constitutes a *lis* sufficient to render inadmissible in evidence a letter written on that subject by one of the members of the family, and addressed to another member of it.—*Butler v. Mountgarrett*, 7 H. L. Cas. 633.

LODGING-HOUSE KEEPER. *See* BANKRUPT.

A person who keeps a lodging-house, and supplies the lodgers with food and wine, is a trader within the meaning of the bankrupt law, 6 Geo. 4, c. 16.—*King v. Simmonds*, 1 H. L. Cas. 754.

LONDON TITHES. *See* TITHES, 1.LORDS JUSTICES. *See* CHANCERY, 2.

LUNACY JURISDICTION.

Quere, whether the words "the Court of Chancery," in the 5th section of the 18 & 19 Vict. c. cxlix. (the *Stockton and Darlington Railway Act*), apply exclusively to the Lord Chancellor or to the Lords Justices sitting in Lunacy?—*Stockton, &c. Railway v. Brown*, 9 H. L. Cas. 246.

LUNATIC. *See* PIN MONEY.MAGISTRATES. *See* MALICIOUS PROSECUTION.

The agent for R., a person convicted of poaching applies to the convicting magistrates for a mitigation of the penalty, on the ground that the poacher supported his father and mother by his labour or industry. A., one of the magistrates, said, "I do not think the defender deserves any mercy, as I am informed that besides being a poacher he is a thief, and has been known to steal beehives and leather," and he appealed to B., another magistrate, who said, "I cannot say as to the beehives, but I was informed by a respectable farmer now dead that he stole a quantity of leather." R. brings his action of damages against the magistrates for defamation, and the action held by the Court below to be relevant, and sent to a jury, and verdict for the pursuer for 125*l.* damages against each of the magistrates, and the verdict confirmed by the Court. The interlocutor of relevancy affirmed by the House of Lords, but the interlocutor confirming the verdict *reversed*, and the case remitted for a new trial.—*Allardice v. Robertson*, 1 Dow & C. 495.

MAJORITY AND MINORITY. *See* CHURCH RATES.

MALICIOUS PROSECUTION.

Where one partner of a firm institutes a prosecution for a theft on the property of the partnership, and the person prosecuted brings an action for a malicious prosecution, that action cannot be sustained against the other individual partners on account of their interest in the

MALICIOUS PROSECUTION—continued.

perty alleged to have been stolen.—*Arbuckle v. Taylor and others*, 3 Dow, 160.

Though the accusation is really without foundation, reasonable and probable cause for making it is an answer to the action.—*Id.*

Per Lord Eldon: A magistrate is bound to terminate his remands within a reasonable time, otherwise he will be liable in damages, but the *Scotch Act* of 1701 does not apply to commitments for farther examination.—*Id.*

MALTA. See COLONIES, 1.

MANDAMUS. See CORPORATION.
RAILWAY.

MANOR.

The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat.—*Delacherois v. Delacherois*, 11 H. L. Cas. 62.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain.—*Id.*

On re-purchase, by the lord, of the fee simple, he will hold them of the chief lord.—*Id.*

They will not, on such re-purchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase.—*Id.*

In the reign of *Charles I.*, a grant was made by patent to *Viscount Montgomery* of a manor to be held in fee and common socage, with power to create as many separate manors, and to appoint as many tenemental lands to each manor as the grantee should think fit, and also with

MANOR—continued.

license to grant in fee simple, or for lesser estates, any of the lands belonging to such manors, to be held thereof respectively by suit of Court, and such other services or rents as he, his heirs, &c., should think fit, *non obstante* the statute *Quia Emptores*. This patent was validated and confirmed by Acts of the *Irish Parliament*. The heir of the grantee, in the year 1721, granted by indenture of lease and release to *A.*, in fee farm, certain of the tenemental lands of the manor. They were described as "situate, lying, and being in the manor," and were to be held at a rent of 6*l.* suit and service to the manor, payment of small sums for leet money, and an obligation to grind corn at the manor mills; performance of each of which things was secured by covenant, and the grantor also reserved a power of distress:

Held, that the lands thus granted out were severed from the manor.—*Delacherois v. Delacherois*, 11 H. L. Cas. 62.

In March, 1836, the owner of the manor executed a will devising "the manor" to the younger of his two nephews. In 1842, he purchased the tenemental lands which had been granted out in 1721. He died in October, 1850, without having altered or republished his will:

Held, that these lands were not by the purchase re-annexed to the manor so as to pass by the will, but devolved upon the testator's heir-at-law.—*Id.*

MANSE. See GLEBE.

1. Circumstances under which a manse repaired at the commencement of an incumbency, and declared "free" or "sufficient" by the Presbytery, can be made, during the same incumbency, the subject of farther reference by the heritors.—*Hamilton (Duke) v. Scott*, 1 Dow, 393.

Finally decided that the minister of a parish partly burghal and partly landward is, *de jure*, entitled to a

MANSE—continued.

manse under the Act 1663.—*Auld v. Hamilton*, 1 Dow & C. 43, and *Moir v. Belshes*, Id. 55, n.

MARKET. See **CHARTER**, 2.**MARRIAGE.** See **HUSBAND AND WIFE.**
LEGITIMACY. WILL.

1. A Scotchman by origin married at *Gibraltar* (while in military service there), an *Englishwoman*. When on half-pay he resided with his wife and family at *Durham*, and kept them there when again employed in the military service. He afterwards took proceedings in *Scotland* to obtain a divorce *à vinculo matrimonii*.

Quære, whether in virtue of his origin the *Scotch Courts* could pronounce such a divorce, the marriage being an *English marriage*?—*Tovey v. Lindsay*, 1 Dow, 117-131.

See *Warrender v. Warrender*, 2 Cl. & F. 488; *Dolphin v. Robins*, 7 H. L. Cas. 390; *In re Daly*, 25 Beav. 456; *Hunt v. Hunt*, 31 Beav. 89; *Wilson's Trusts*, L. R., 1 Eq., 247; *McCarthy v. De Caiz*, 2 Ry. & Moo. 620; 2 Cl. & F. 568, n.

2. A declaration by a man in the presence of witnesses, that *A. B.* is his wife, and that the children he has had by her are her legitimate children, is sufficient to constitute a marriage *per verba de presenti*, according to the laws of *Scotland*.—*M'Adam v. Walker*, 1 Dow, 148.

See *Reg v. Millis*, 10 Cl. & F. 534; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232; *Bell v. Graham*, 13 Moo. P. C. 242.

3. A reconciliation between husband and wife after a separation does away with the effect of it, but the evidence of such reconciliation must be clear. A married woman actually separated from her husband, and in litigation with him, is capable of making an agreement with him on the subject of that litigation, and will be bound by it.—*Bateman v. Ross (Countess)* 1 Dow, 235.

See *Wilson v. Wilson*, 14 Sim. 405; *Williams v. Bailey*, L. R., 2 Eq., 734; *Nicholl v. Jones*, L. R., 3 Eq., 696.

4. Where two parties in *Scotland* cohabit

MARRIAGE—continued.

regularly, there is a *primâ facie* presumption of marriage, though that may be rebutted by evidence of the circumstances under which the cohabitation has existed. But this presumption will not arise where the connection is known to have been illicit in its origin.—*Cunninghame v. Cunninghame*, 2 Dow, 482.

The "repute" to raise a presumption of marriage must be founded on general opinion.—*Id.*

See *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Piers v. Piers*, 2 H. L. Cas. 331.

Certificate of celebration not sufficient to prove the marriage if impeached by evidence that the woman was not present when the marriage was stated in the certificate to have been celebrated.—*Id.*

Semble, per Lord Eldon (Chancellor): That in cases of continued cohabitation, presumption is in favour of the legality of the union, except where it clearly appeared that the connection was at first illicit.—*Id.*; But see the *Breadalbane Case*, L. R., 1 Sc. Ap., 182.

5. *Mary B. Macneil* married to *Jolly* in a manner unquestionably regular, on 13th June, 1816. Summons, in 1818, of declarator of marriage and adherence (restitution of conjugal rights) by *Macgregor* against *Mary B. Macneil* alone, founded on alleged irregular prior marriage, followed by a marriage by a clergyman, on 23rd May, 1816. Charge of previous irregular marriage abandoned, and evidence confined to the marriage before the clergyman on 23rd May, 1816. First, documents; certificate, or *quasi*, certificate of proclamation of banns, but no banns actually published; entry in book (private memorandum not admissible in evidence) of the clergyman; certificate of the clergyman (a bad character, afterwards convicted in the Criminal Court of forging marriage lines or certificates). Secondly, witnesses; the clergyman's wife and daughter the only witnesses. Thirdly, admissions of *M. B. Macneil*, that she went before the clergyman with *Macgregor*, but did so from undue influence and fear, and denying con-

MARRIAGE—*continued.*

sent; evidence of facts and circumstances before and after the alleged marriage with *Macgregor*: five children born of the marriage with *Jolly* in the course of the proceedings. Judgments of the Courts below sustaining the prior marriage with *Macgregor* reversed upon appeal by the Lords; the evidence of the ceremony and consent being considered defective, and the pleading irregular.—*Macneil v. Macgregor*, 1 Dow & C. 208.

- A marriage without actual proclamation of banns, not considered as a regular marriage, though celebrated by a clergyman, and evidence of facts and circumstances to elide (remove) the presumption of consent admissible.—*Id.*

No opinion (because not necessary to be decided in this case) whether evidence of facts and circumstances can be admitted to rebut the presumption of consent arising from a marriage unquestionably regular.—*Id.*

No opinion (because not necessary to be decided in this case) whether *Jolly* and the children ought to have been parties to the suit for their interests.—*Id.*

No opinion (because not necessary to be decided in this case) whether, although the declarator had been sustained, it must necessarily have been followed, under such circumstances as appeared in the present case, by a judgment of adherence (restitution of conjugal rights).—*Id.*

No opinion (because not necessary to be decided in the present case) whether admissions, by a party contracting of a prior marriage, can be received in evidence to destroy the effect of a subsequent marriage contracted by that party.—*Id.*

See *Stewart v. Menzies*, 8 Cl. & F. 309.

6. In a suit for a declarator of marriage founded on a promise *subsequente copula*, there was no direct evidence of the promise, but from facts and circumstances, and chiefly from letters written by the defender to the pursuer (the defender having destroyed the letters written by the

MARRIAGE—*continued.*

pursuer to him); the Commissary Court and Court of Session thought that there was sufficient ground to warrant the inference that a promise of marriage had been given and accepted previous to the *concubitus*, and declared for the marriage. The judgment affirmed by the Lords.—*Honyman v. Campbell*, 2 Dow & C. 265.

7. A *Scotchman*, domiciled in *Scotland*, was married in *England* to an *Englishwoman*, and by marriage contract secured to her a jointure on his *Scotch* estates. They went to *Scotland* after their marriage, and resided there a short time, when they returned to *England*. They afterwards agreed to a separation, and articles of agreement were executed by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in *Scotland*, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation:

Held, by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in *Scotland*, where the husband's was, and that she was amenable to the jurisdiction of the *Scotch* Court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the *Scotch* Courts to entertain a suit to dissolve a marriage contracted in *England*, whatever effect that dissolution may or may not produce out of *Scotland*.—*Warrender v. Warrender*, 2 Cl. & F. 488.

See *Dalkousie v. McDonall*, 7 Cl. & F. 817; *Birtwhistle v. Vardill*, 2 Cl. & F. 571; 7 Cl. & F. 895; *Munro v. Munro*, 7 Cl. & F. 842; *Geils v. Geils*, 3 H. L. Cas. 280; *In re Daly's Settlement*, 25 Beav. 456; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Brook v. Brook*, 9 H. L. Cas. 193; *Bonnatyne v. Barrington*, Cas. temp. Nap. 491;

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Wilson's Trusts, L. R., 1 Eq., 251;
Hunt v. Hunt, 31 Beav. 107.

8. A Scotch divorce of an English marriage will not justify the parties divorced in marrying again in England.—*Lolley's Case*, 2 Cl. & F. 567.

See *Ford v. De Pontis*, 30 Beav. 586; *Wilson's Case*, L. R., 1 Eq., 251.

9. Nor can a Danish divorce affect an English marriage.—*McCarthy v. De Caix*, 2 Cl. & F. 568, n.

See *Dolphin v. Robins*, 7 H. L. Cas. 390.

10. The marriage of an officer, celebrated by a chaplain of the British army, within the lines of the army when serving abroad, is valid under the 4 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command.—*Waklegrave Peerage*, 4 Cl. & F. 649.

11. A submission by a woman to arbitration is revoked by her marriage before the award is made.—*McCan v. O'Ferrall*, 8 Cl. & F. 30.

12. *J. M.* and *C. S.* cohabited. There was no direct evidence of the time at which their intercourse began, but *J. M.* wrote to *C. S.* a letter, which was dated in March, 1826, and was in the following terms: "*Christy*, you and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born in consequence of the present connection between us." It appeared that this letter was not delivered till 1828:

Held, that it did not in any way constitute a marriage by the law of Scotland.—*Stewart v. Menzies*, 8 Cl. & F. 309.

See *Bell v. Graham*, 13 Moo. P. C. 258.

13. *M. C.*, an unmarried woman, while living with her mother, had two children by *A. H.*, a single man, who gave bond to the parish to indemnify it against their maintenance. He afterwards changed his own resi-

MARRIAGE—continued.

dence, and *M. C.* went with her two children to reside in his house, and so resided till her death. Shortly after this change of residence, he obtained from his law agent a form of words, necessary by the law of Scotland to constitute a marriage. He wrote this note. "My dearest *May*, I hereby solemnly declare that you are my lawful wife, though, for particular reasons, I wish our marriage to be kept private for the present. I am your affectionate husband, *A. H.*" The note was addressed, inside, to "*M. C.*," but outside, to "*Mrs. A. H.*" He deposited the note with the law agent, saying, "it would please and satisfy her," but directed the agent to keep it secret till his, *A. H.*'s death. *A. H.* always represented himself to his relations as a single man:

Held, that a valid marriage had been constituted between these parties; that the words of the note were sufficient for that purpose, so far as the man was concerned; and that his conduct and expressions to the law agent, together with the subsequent residence of the woman with him, must be taken as evidence of her knowledge of the paper, and her assent to it.—*Hamilton v. Hamilton*, 9 Cl. & F. 327.

The law agent was, under the circumstances here, equally the agent of the wife as of the husband for the purpose of the custody of the paper.—*Id.*

14. *A.*, a member of the established church in Ireland, went, accompanied by *B.*, a Presbyterian, to the house of *C.*, a regularly placed minister of the Presbyterians of the parish where *C.* resided, and there entered into a present contract of marriage with the said *B.*; the minister performing a religious ceremony between them, according to the rites of the Presbyterian church. *A.* and *B.* lived together for some time as man and wife; *A.* afterwards, *B.* being still alive, married another person, in a parish church in England.

Quære, whether the first contract thus entered into was sufficiently a

MARRIAGE—continued.

marriage to support an indictment against *A.* for bigamy.

Lord *Brougham*, Lord *Denman*, and Lord *Campbell* were of opinion that it was. The Lord Chancellor, Lord *Cottenham*, and Lord *Abinger* were of opinion that it was not. The Lords being thus divided, the rule "*semper præsuntur pro negante*" applied, and judgment was given for the defendant in error.—*The Queen v. Millis*, 10 Cl. & F. 534.

See *Beamish v. Beamish*, 9 H. L. Cas. 276.

15. The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibiting the contracting of marriage, or to annul any already contracted in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of *England* or without.—*The Sussex Peerage Case*, 11 Cl. & F. 85.

16. *A.*, a *Scotchman*, married in *Scotland* and went abroad; his wife cohabited with *C.*, and had children by him. To make such children legitimate, it was held necessary, for those who asserted their legitimacy, to prove either a legal origin of the cohabitation, or a change in the nature of it after the death of *A.* had become known to all the parties. The mere fact that *C.* and the woman continued to live together was not sufficient for that purpose. Under such circumstances, the children were held illegitimate though born after the date of *A.*'s death.—*Lapsley v. Grierson*, 1 H. L. Cas. 498.

Quære, *C.* and *B.* live together as man and wife, in the *bonâ fide* belief that *A.*, to whom *B.* had been lawfully married, was dead; in fact he was alive; will his subsequent death, during the continuance of their cohabitation, confer on it, according to the law of *Scotland*, the character of a lawful marriage?—*Id.*

17. A young lady, 18 years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her

MARRIAGE—continued.

father's will, who she considered as her guardian, was induced by his brother, who was residing in the same house, and was 52 years of age, to promise to marry him; she withdrew that promise a few days afterwards, but was importuned again, and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement, made by him, of her age and residence, in the publication of the banns and in the register of the marriage. There was no cohabitation or consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an Act to annul the marriage, the same being considered valid in law:

Held, that it did not appear by the evidence that the marriage was not solemnised with the free consent of the lady, and that the case made was not such as to justify legislative interference.—*Field's Marriage Annuling Bill*, 2 H. L. Cas. 48.

18. The question of the validity of a marriage cannot be tried like any other question of fact, which is independent of presumption, for the law will presume in favour of marriage. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof. Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them by a regularly ordained clergyman, in a private house, as if by special license, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no license could be found, nor any entry of the granting of it, or of the marriage itself could be discovered; and though the bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had

MARRIAGE—continued.

never granted any license for such marriage.—*Piers v. Piers*, 2 H. L. Cas. 331.

19. Delay in instituting a suit for nullity of marriage on the ground of impotence, is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind.—*Castleden v. Castleden*, 9 H. L. Cas. 186.

Where, therefore, a woman who had married in 1834, lived with her husband till 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till October, 1858, and in November, 1858, instituted a suit for nullity of marriage on the ground of incompetence, it was held, that she was bound to give unequivocal proof of the truth of the allegation in the petition; and the Lords not being satisfied that the evidence was of that character, the decree of the Court below dismissing the petition, was confirmed.—*Id.*

20. The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*. If the latter are contrary to the law of the domicile, the marriage (though duly solemnized elsewhere) is there void.—*Brook v. Brook*, 9 H. L. Cas. 193.

The Marriage Act, 26 Geo. 2, c. 33, only applies to the forms of certain marriages celebrated in this country; it does not touch the essentials of the contract. It is, therefore, only territorial.—*Id.*

The 5 & 6 Will. 4, c. 54, affects all domiciled *English* subjects wherever they may be transiently resident. It does not affect them when actually domiciled in *British Colonies* acquired by conquest where a different law exists.—*Id.*

The marriage of a man with the sister of his deceased wife is declared by the 28 Hen. 8, c. 7, to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in the 28 Hen. 8, c. 16, and

MARRIAGE—continued.

32 Hen. 8, c. 38, which are in force —*Brook v. Brook*, 9 H. L. Cas. 193.

Being forbidden by our law, such a marriage contracted by *British* subjects, temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, and duly celebrated according to the forms required by the law of that country, is absolutely void here.—*Id.*

A. and B., *British* subjects, intermarried; B. died; A. and C. (the lawful sister of B.), being both at the time lawfully domiciled *British* subjects, went abroad to *Denmark*, where, by the *Danish* law, the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of *Denmark*, married:

Held, that under the provisions of the 5 & 6 Will. 4, c. 54, the marriage in *Denmark* was void.—*Id.*

21. It being settled by the decision in *The Queen v. Millis*, that to constitute a valid marriage by the common law of *England*, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid.—*Beamish v. Beamish*, 9 H. L. Cas. 274.

As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman.—*Id.*

(*Goole v. Hudson*, and *Holmes v. Holmes*, commented on and explained.)

Semble, that the decision in *The Queen v. Millis* is not to be applied to a case where the presence of a minister in holy orders is impossible.—*Id.*

MARRIAGE SETTLEMENT. See AGREEMENT. BOND. ELECTION. FRAUD. LEGITIM. SETTLEMENT. WILL.

1. A father having expressed his intention of making a larger provision for his younger children than he had before done, dies without having executed his intention. The son and heir-at-law, apprised of his

MARRIAGE SETTLEMENT—*continued.*

father's intention, enters into a correspondence, in which he states a resolution on his part, to make a farther provision for the younger members of the family. His sister's allowance being 4000*l.*, she marries on the faith of the correspondence :

Held, a good contract for a marriage settlement, and that the son was bound to pay the 4000*l.*—*Montgomery v. Reilly*, 1 Dow & C. 62.

2. *T. B.*, entitled under one will to an estate tail, expectant on the death of two elder brothers without issue or recovery suffered, and entitled under another will to an estate for life, with a remote remainder in tail, proposes to covenant that on his marriage with *L. C.*, a ward of Court, in case either of the limitations in his favour in the wills shall take effect, he will charge the estate to which he shall become entitled, with an addition of 8000*l.* to the fortune of younger children. The same Master to whom the proposal is submitted, settles the covenant in the marriage articles with words of *inheritance* not occurring in the proposal, viz., "that in case he shall become seised of or entitled to all or any of the manors, hereditaments, or estates devised by such wills, or by either of them, or of any other lands, &c., *for any estate of inheritance in possession or otherwise, capable of being settled or bound in law or equity,*" he will charge the estates as aforesaid ; and this is approved by the Court. *T. B.* becomes entitled in possession to the life estate only, and on claim by a younger child that the 8000*l.* should be declared to be a charge on the life estate, and reference to a Master, he reports that the limitations under which *T. B.* covenanted to charge the estates with the 8000*l.* never took place. The report confirmed by decretal order of the Court below, and the judgment affirmed by the Lords.—*Willis v. Robinson*, 1 Dow & C. 469.

3. A deed of settlement was made in contemplation of marriage, and contained a proviso by which the estates, &c., thereby granted, should, in the first place, be charged with certain portions therein mentioned, due to

MARRIAGE SETTLEMENT—*continued.*

the brothers and sisters of the settlor, and with certain debts set forth in the schedule thereunto annexed. The covenant against incumbrances specially excepted a jointure to the settlor's mother, and the before-mentioned portions and debts ; and the covenant for farther assurance contained an exception similar to the foregoing, by an express reference to it. The settlor was possessed of other estates besides those settled. The settlor, after his marriage, paid off some of the portions and some of the debts, and by his will declared such payments to be in ease of his settled estate :

Held, by the House of Lords, reversing a decree of the Court of Chancery in *Ireland*, that all rights must be taken to be as they were established at the date of the conveyance, and therefore neither any direction in the will of the settlor, nor the state of his affairs at his decease, could alter its construction, and consequently, that the debts, &c. continued to stand as a burthen on the real estates, and that the personal estates were exonerated in the hands of the executors.—*Vandeleur v. Vandeleur*, 3 Cl. & F. 82.

4. By a marriage settlement, certain freehold lands, together with the mansion house and park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, 1000*l.* a year, clear from all deductions whatever. The settlor by his will confirmed the settlement, and gave the mansion house and park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in *Pennsylvania*, the latter free from all incumbrances whatever ; he created two rent-charges, payable out of his real estates in *England* :

Held, that the devise to the wife of the lands charged by the settlements was not intended to merge the charge in the settlement, and that she was, therefore, entitled to enjoy the mansion house and park without any deduction being on that account made from the annuity, which was to be raised entirely out of the other

MARRIAGE SETTLEMENT—*continued.*

English estates held by the nephew.
—*Powell v. Grigby*, 3 Cl. & F. 103.

5. *W. L.* bequeathed 5000 *l.* to the daughter of his brother, *J. L.*, charged on his real estates, and authorised the interest thereon to be raised for her maintenance, if *J. L.* should so direct, and he devised his real estates so charged to *J. L.* in fee. *J. L.* bequeathed 10,000 *l.* in trust for his daughter for life, and after her death, in trust for *her children*, and declared that that sum should be in addition to the sum to which she was entitled under *W. L.*'s will. The daughter afterwards married. Her father advanced to her husband 15,000 *l.* as her marriage portion, and, by the settlement, pin money and a jointure for the wife, and portions for the *younger children of the marriage*, were provided out of the husband's property, and the 15,000 *l.* were declared to be in satisfaction of the sums to which the wife was entitled under *W. L.*'s will. The father died in 1794; no demand was made for the 10,000 *l.* until 1826:

Held, by the Lords (reversing the decree of the Vice-Chancellor), that the legacy of 10,000 *l.* was satisfied by the marriage portion, assuming as one ground of their judgment, that the daughter was apprised of the contents of her father's will soon after his death.—*Durham (Earl) v. Whar-ton*, 3 Cl. & F. 146.

See *Hopwood v. Hopwood*, 7 H. L. Cas. 728; *Hall v. Raymond*, Cas. temp. Nap. 87; *Garner v. Holmes*, Cas. temp. Nap. 117; *Coventry v. Chichester*, 2 De G., J., & S. 340; L.R., 2 H. L., 76.

6. *Robert Marke* being seised to him, his heirs and assigns, according to the custom of the manor of *Taunton Deane*, of certain messuages within that manor, surrendered the same to trustees, in pursuance of articles of agreement made in contemplation of marriage, on trust, to permit him, his heirs, and assigns, to enjoy the premises until the marriage, and from the solemnization thereof on trust for himself for life, and after his decease on trust for the intended

MARRIAGE SETTLEMENT—*continued.*

wife for life, for her support and in bar of dower, and after the death of the survivor of the husband and wife, on trust to surrender the premises into the hands of the lord of the manor, to the use of the child or children of the marriage, their heirs and assigns; such surrenders to be made at the costs of the children, who should be entitled to take the same; and in default of issue of the marriage living at the death of the survivor of the husband and wife, then on this special trust, to surrender the premises into the hands of the lord of the manor, to the use of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last mentioned to be made at the costs and charges in all things of the person or persons who by virtue of the last-mentioned condition or limitation should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of her mother. On the daughter's attaining 21, the premises were surrendered to the lord of the manor, to her use, and she, by her will, devised them to the sons of her mother by a second husband, and at the same time surrendered them to the use of her will; her mother surviving her continued in possession of the premises till her own death:

Held, by the Lords (affirming decrees of the Court below in a suit between a purchaser for valuable consideration from the devisees, and the settlor's youngest sister and customary heiress at his widow's death), that by virtue of the ultimate limitation in the articles, she was entitled to the customary estates from the death of the widow.—*Bush v. Locke*, 3 Cl. & F. 721.

7. In a marriage contract, the husband covenanted to secure his intended wife the benefit of the pension or annuity payable from a certain fund to the widow of a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife, excepting only through her right to and possession of property producing the

MARRIAGE SETTLEMENT—*continued.*

amount of the pension, he bound himself, his executors, &c., to make payment to her of a clear yearly annuity equal to the pension. At the time of his death, he had secured his wife a pension on the *Bombay Military Fund* to the amount of 365*l.* a year. From different causes (other than her possession of property producing the amount of the pension) the payment of the pension was at first reduced, and afterwards stopped :

Held, that the contract was an absolute contract to make good the amount of the pension in every case but that of the possession of property producing a similar amount, and that event not having happened, the husband's estate was declared liable.—*Taylor v. Hossack*, 5 Cl & F. 380.

8. By *A.*'s will, in 1783, his widow, whom he appointed executrix, was to receive 400*l.* a year for the maintenance of herself and their children, but only 60*l.* a year for herself if she married again. She proved the will, and was appointed receiver of her children's fortunes; she married again in 1791, but, concealing her marriage, passed her accounts as widow, taking credit for the 400*l.* a year. On her death, in 1794, *B.*, her second husband, administered to her and to her first husband's estate, and having been also appointed receiver of the children's fortunes, passed his accounts in continuation of the widow's without acknowledging their marriage. All the children having attained their majority in 1802, disputed *B.*'s accounts, which were then referred to arbitration. *C.*, the eldest of the children, married before the award was made, and one of the arbitrators was a trustee of her settlement; her marriage was also concealed from the Court, and the accounts afterwards passed describing her by her maiden name. *B.* paid her husband, as if under the award and in ignorance of the settlement, sums of money which ought to have been applied to the trusts of the settlement :

Held (reversing decrees made on a bill

MARRIAGE SETTLEMENT—*continued.*

filed by *C.* and her children, in 1836, against *B.* and the trustee), that all the accounts of *A.*'s estate should be again taken by the Master, without regard to the award, or to the accounts passed subsequently to *C.*'s marriage; that *B.*'s estate should be charged with the difference between 400*l.* and 60*l.*, which his wife had received; and that consideration of the liabilities of *C.*'s husband, and of the trustee under their marriage settlement, should be reserved until after the report.—*M'Can v. O'Ferrall*, 8 Cl. & F. 30.

9. A representation made by one party for the purpose of influencing the conduct of another, and acted on by the latter, will in general be sufficient to entitle him to the assistance of a Court of Equity for the purpose of realising such representation. And so, in proposals of marriage, if the parent or his agent deliberately holds out inducements to the suitor to celebrate the marriage, and he consents, and celebrates it, believing it was intended that he should have the benefit so held out to him, a Court of Equity will give effect to the proposals. Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that *Mr. J. P. T.* (the father) also intends to leave a farther sum of 10,000*l.* in his will to *Miss T.*, to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject, of course, to revision; but they will be sufficient for *Baron B.* to act upon." *Baron B.*, upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement afterwards executed there was no mention of this 10,000*l.*, and it was not left by *J. P. T.* in his will :

Held, that his estate was liable to the payment of the 10,000*l.*, with interest, from the end of one year after his death.—*Hammersley v. De Biel*, 12 Cl. & F. 45.

Semble, that a letter written and signed by the father after the marriage of his daughter, admitting the terms of

MARRIAGE SETTLEMENT—continued.

the written proposals which were not signed, was a recognition of them as his agreement, sufficiently signed by him within the Statute of Frauds.—*Hammersley v. De Biel*, 12 Cl. & F. 45.

See *Maunsell v. White*, 4 H. L. Cas. 1039; *Jorden v. Money*, 5 H. L. Cas. 185; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 89; *Caton v. Caton*, L. R., 2 H. L., 132.

10. A father having, upon the marriage of his daughter, agreed to give her a portion of 100,000*l.*, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock, to be held by them in trust for the daughter's separate use for life; and after her death for the children of the marriage as the husband and she should jointly appoint. The father afterwards, by his will, gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally, as she should by deed or will appoint:

Held, that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the difference of the trusts, and it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was bound to elect to take.—*Thynne v. Glengall*, 2 H. L. Cas. 131.

See *Coventry v. Chichester*, L. R., 2 H. L., 76; *Caton v. Caton*, L. R., 2 H. L., 135.

11. On a treaty respecting the marriage of *H. M.*, who was believed to have considerable expectations from his uncle, *H. E.*, the guardians of the lady desired a settlement; and *H. M.* addressed a letter to *H. E.*, who answered, "I have made my will, and left you my property in the county of *T.*, which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. *H. E.* of real estate upon the marriage, in the usual course of settlement, and until

MARRIAGE SETTLEMENT—continued.

the sum of 10,000*l.* shall be secured to the trustees of the estate" of the father of the lady from whom *H. M.* had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to *H. E.*, who, in September 1815 wrote, "My sentiments respecting you continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of *Tipperary* estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I were to deviate in this instance from a resolution I have long made." This answer was, at the desire of *H. E.*, communicated to the guardians, who, in March, 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited that "*H. M.* has reason to expect that he will, upon the decease of *H. E.*, become entitled, by virtue of the will of *H. E.*, to a certain portion of his estate and property, pursuant to the declaration of *H. E.*, contained in his letter to *H. M.* of September, 1815." *H. E.* was made one of the trustees of the settlement, and, about 12 months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents beyond the fact that he was named as one of the trustees. *H. E.* afterwards devised his property to other persons:

Held, affirming the decision of the Court below, that *H. M.* could not maintain a suit to compel the trustees under the will of *H. E.* to convey the *Tipperary* estate to him, for that *H. E.*'s letter did not amount to a contract to settle it on him.—*Maunsell v. White*, 4 H. L. Cas. 1039.

12. *W. M.* had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had

MARRIAGE SETTLEMENT—*continued.*

been entered up, but not executed; the bond and warrant of attorney came into the possession of *L.*, as personal representative of the original obligee. She was on terms of affectionate friendship with *W. M.*, and often said that he had been unfairly treated, in being made to enter into these securities. *L.* had in early life received from the father of *W. M.* a conveyance of some property in *India*; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees. In truth, the money consideration was, if any, a debt of 1200 rupees, the rest was a purely voluntary gift, and no money whatever passed when the conveyance was executed. *W. M.* was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. *W. M.*'s father told *L.* that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of this *Indian* property as a voluntary conveyance made without consideration. In his depositions he said that *L.* promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of declarations by her that she "had abandoned" the claim, and of a promise, often repeated, that she would never trouble *W. M.* about it:

Held, that this promise, if it constituted a contract, was not a contract made "in consideration of marriage," so as to bring it within the words of the Statute of Frauds.—*Jorden v. Money*, 5 H. L. Cas. 185.

13. The presumption of law is against double portions; where a sum of money is given by the will of a parent to a particular child, and the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the adeption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is

MARRIAGE SETTLEMENT—*continued.*

not necessary that the legacy should be paid in order that it may be adeemed.—*Hopwood v. Hopwood*, 7 H. L. Cas. 728.

14. In marriage articles in 1802 (which were to be, but never were, followed by a formal settlement), two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees in trust to permit the husband and wife to receive the profits during life, and (as to her portion) should she survive her husband, "to such of her issue male by her said husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint;" and in case of no appointment, to the "issue male" of the husband and wife; and in case of no issue male, then to go amongst her daughters; "and in case of failure of issue male or female, then to go to such person or persons" as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles appointed her property to her grandson, the son of her daughter, describing him as "issue male" of her marriage:

Held, that the articles were executory; that if in accordance with them a settlement had been executed, the estate would have been put in strict settlement; and that the power reserved by them was not well exercised; the grandson, the son of a daughter, not coming within the description of "issue male" therein contained.—*Lambert v. Peyton*, 8 H. L. Cas. 1.

The lady married again, and in the settlement on this second marriage, the surviving trustee of the articles "granted, released, and confirmed" to the trustees under the second settlement, "all his right," to "the use and behoof of" the widow as under the articles:

Held, that, setting up a claim to the estate under the appointment by her, the grandson could not, as an objection to a suit to compel him to

MARRIAGE SETTLEMENT—*continued.*

convey the estate in specific performance of the marriage articles, insist that the legal estate was not in him; nor could he object to the decree in this suit that it dealt only with the property over which the wife had assumed to exercise a power of appointment, and not with the whole property included in the marriage articles.—*Lambert v. Peyton*, 8 H. L. Cas. 1.

The decree in this suit directing a conveyance, but not declaring the rights of the parties, was held to be defective.—*Id.*

15. Where portions for younger children are created, if their interests are vested, and if the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised although the only means of raising them may be the sale or mortgage of a reversionary term, the intention of the parties creating the portions is to govern.—*Massy v. Lloyd*, 10 H. L. Cas. 248.

But if the principal is not raisable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time except on express words.—*Id.*

Lord Cottenham's observation on this point (*Milloun (Lord) v. Trench*, 4 Cl. & F. 307-8) adopted.—*Id.*

There is a distinction between the word "payable" when used in speaking of a sum payable to a beneficiary and when used in speaking of a sum payable by a trustee.—*Id.*

In a marriage settlement, the estate was given to trustees on trust to pay the rents to the wife for life; to raise by sale or mortgage a sum of 10,000*l.* for a child of the wife by a former marriage, and also a sum of 500*l.* for a relative of the first husband, then, after the death of the wife, to pay 1000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at 21 or marriage, and until such portion should be-

MARRIAGE SETTLEMENT—*continued.*

come payable, to raise money for the maintenance and education of the children as the wife should deem meet, not exceeding, &c.: provided, that if there should be no younger child, or it should die before 21 or marriage, 5000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained 21, and married in 1824. The father died in April 1859. The Court of Chancery, in *Ireland*, had held that the principal sum of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage.

The decree of the Court of Chancery was reversed, and the cause remitted with directions that interest did not become payable till the death of the father.—*Massy v. Lloyd*, 10 H. L. Cas. 248.

16. A., the younger of two sisters (the only children of their father), was about to be married. By a pre-nuptial contract executed abroad, where the marriage was to be celebrated, and the parties to it were domiciled, the father agreed to give A. a dowry of 40,000*l.* Of this, 20,000*l.* were to be paid within six months after the marriage. The remaining 20,000*l.*, divided into two portions of 10,000*l.* each, were made payable, one on a given event the other on the father's death, with power reserved to him to pay the last-mentioned sum during his life. In the contract he declared his intention to give to A. an equal portion with her sister of what he should leave as residue, and used words which appeared to leave it doubtful whether this portion was to be ascertained before or after the payment of debts and legacies. By his will he gave legacies to an amount which, with the debts, entirely exhausted what would otherwise have been residue. The final sum of 10,000*l.* was not paid in his lifetime. After his death A. filed a bill against his representatives, to obtain pay-

MARRIAGE SETTLEMENT—continued.

ment of this sum, and also payment of the share of the residue, calculated on its gross amount before payment of debts and legacies. The Court below held, that on the proper construction of the contract, this latter claim was unfounded; and as to this claim, dismissed the bill with costs, but ordered payment of the 10,000*l.*, with interest to be calculated from the period of six months after the father's death:

Held, that the order dismissing the bill with costs was right, for that the claim was founded on a misinterpretation, made by the plaintiff, of the contract, and was not the consequence of any act of the testator, such as ought to make the costs come out of the estate.—*Di Sora v. Philipps*, 10 H. L. Cas. 624.

But the decree was varied so far as related to the interest on the 10,000*l.*, which was ordered to be calculated from the date of the father's death.—*Id.*

MASTER OF A SHIP. See ABANDONMENT. SHIP.**MASTER AND SERVANT.**

A master having admitted that by his factor's agreement, he promised to his servant, in addition to his ordinary wages, a present of 20*l.*, the service to be at all events till the end of one year; and that sum not having been paid at the expiration of the year, and the service having continued for several years:

Held, that the contract was renewed in all its parts from year to year; and nothing being said to the contrary by either party, that 20*l.* were due for every year of the service.—*Mansfield (Earl) v. Scott*, 1 Cl. & F. 319.

MEETING, PRESENCE AT. See CESSIO BONORUM.

The mere fact of being present at a meeting of road trustees does not constitute a *prima facie* liability attaching to the person thus present. The *onus* of proof of his having done some act to render himself

MEETING, PRESENCE AT—continued.

liable, lies on the person who proposes to make him so.—*Higgins v. Livingstone*, 4 Dow, 341.

MERCHANTS' ACCOUNTS. See ACCOUNTS. INTEREST.

1. Though a merchant's books may, by the law of *Scotland*, afford a *semi-plena probatio* in his own favour, yet, in order to have that effect, they must be regularly kept.—*Ivory v. Gourlay*, 4 Dow, 467.

Honest demands can be enforced only in a manner consistent with general policy and the interests of the community.—*Id.*

2. By the law of *England*, a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions.—*Fergusson v. Fyffe*, 8 Cl. & F. 121.

MILITIA. See ERROR IN LAW. INSURANCE.

A. insured in July, 1808, against the consequences of any ballot for the county of *I.* that might take place between the time of insurance and the 1st of September following. At the ballot, the deputy lieutenants utterly mistook the meaning of two statutes, and drew 10 times as many men as the law intended. Among the persons thus irregularly drawn was the assured:

Held, that the insurers were not liable for the consequences of the mistake of the deputy lieutenants.—*Scott v. M'Intosh*, 2 Dow, 322.

MINES AND MINERALS. See RAILWAY.

1. A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal-mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:

Held, that the coal pillars could not be

MINES AND MINERALS—continued.

removed.—*Glasgow (Earl) v. The Hurler Alum Company*, 3 H. L. Cas. 25.

2. Power in co-adventurers to forfeit the shares of one of their number for non-payment of calls, is not necessarily incident to a mining adventure conducted on the cost-book principle.—*Clarke v. Hart*, 6 H. L. Cas. 633.

Where such a power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed.—*Id.*

Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement), that his shares are liable to forfeiture on non-payment of calls, will not affect his rights under the agreement.—*Id.*

A., B., and C., in November, 1848, entered into an agreement to work mines on the cost-book principle. A. did not pay up his calls. In a letter of November 1849, to his co-adventurers, he spoke of his shares as liable to forfeiture. He received a notice of a meeting of the co-adventurers, to be held on the 3rd May, 1850, to declare his shares forfeited. He denied the right to forfeit them. The meeting was held, but instead of declaring A.'s shares forfeited, the co-adventurers passed a resolution to give him time to the 15th May, after which it was declared that if the calls were not paid up, the shares would be treated as forfeited. The calls were not paid on the day named, and a letter was afterwards written, stating that the shares had been forfeited on the 31st May:

Held, that even if there had been a right of forfeiture necessarily incident to work a mine on the cost-book principle, the proper steps to exercise that right had not been taken, and that the shares were not forfeited:

Held also, that what was done on the 31st May, 1850, did not operate as a dissolution of the partnership.—*Id.*

MINES AND MINERALS—continued.

A. had, in his letter of November, 1849, stated that his shares were liable to forfeiture; he repeatedly afterwards denied the existence of such liability. In May, 1850, they were declared forfeited. A farther correspondence ensued, in the course of which he said he should wait to enforce his rights till the profits of the mines would pay the law charges. In August, 1853, he filed his bill:

Held, that these circumstances did not disentitle him to relief in equity, the matter in which he sought relief being one which related to an executed and not an executory interest.—*Clarke v. Hart*, 6 H. L. Cas. 633.

Held also, that the judgment of the Court below being affirmed, ought to be affirmed with costs, they being a legal consequence, not a result necessarily affected by the conduct of the parties.—*Id.*

(*Pickard v. Sears*, 6 Ad. & El. 469, and *Freeman v. Cooke*, 2 Exch. Rep. 654, commented on.)

3. *Primâ facie*, the owner of land is entitled to the surface itself, and all below it, *ex jure natura*; those who seek to derogate from that right must do so by virtue of some grant or conveyance.—*Rowbotham v. Wilson*, 8 H. L. Cas. 348.

The rights of the grantee of the minerals depend on the terms of the deed by which they are conveyed. Under a grant of minerals a power to get them is a necessary incident.—*Id.*

In 1770 a private Act of Parliament was passed to provide for the allotment of commons and commonable lands, &c. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The Commissioners, by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause,

MINES AND MINERALS—*continued.*

declaring that the proprietors agreed for each other, and their heirs, that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." The mines were worked by A.'s assignee, and the surface of the land thereby (but without negligence) injured :

Held, that whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, and B., therefore, could not maintain an action for damage on that account.—*Roubotham v. Wilson*, 8 H. L. Cas. 348.

Quere, whether this clause could operate as a release of the right to support?—*Id.*

The circumstance that (some years after the award, but many more than 20 years before the injury complained of) houses were erected on the land, held not to make any difference with regard to the relative rights of the parties under the award.—*Roubotham v. Wilson*, 8 H. L. Cas. 348.

4. The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with he has no legal ground of complaint, although in fact, something may have been done which (without his knowledge) has occasioned results that will

MINES AND MINERALS—*continued.*

afterwards affect his property.—*Buckhouse v. Bonomi*, 9 H. L. Cas. 503.

4. was the owner of certain houses standing on land which was surrounded by the lands of B., C., and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C., and D. sank in; and after more than six years' interval their sinking occasioned an injury to the houses of A.:

Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the Statute of Limitations.—*Id.*

5. A vendor of land having sold it under an Act of Parliament for the purposes of a railway, cannot afterwards work the minerals under the surface (though they are expressly reserved to him by his grant, or under the provisions of the Railway Company's Act) in such a manner as to prejudice the use of the land for the purposes for which it has been purchased.—*Elliot v. The North Eastern Railway Company*, 10 H. L. Cas. 333.

MISDIRECTION *See* CHARITY.
PATENT. PLEADING. PRACTICE.MODUS. *See* TITHES.

In a bill for tithes, the defendants set up a modus for *owners* (persons dwelling out of the parish but holding lands within it) to pay 4*d.* per acre for all ancient pasture lands:

Held, that such modus, if proved in fact, would be good in law.—*Byron v. Cooper*, 11 Cl. & F. 556.

The existence of this modus having been established, the rector was allowed to take an issue to try whether it applied to ancient pasture lands, which, after being meadowed or ploughed up within the time of legal memory, were reconverted to pasture.—*Id.*

To a bill by the rector against the owners and occupiers of lands in the

MODUS—continued.

parish for an account of tithes they set up a modus of 13*l.* 6*s.* 8*d.*, payable half yearly, and they showed receipts for that payment under various descriptions, such as "rent for the rectory," and "prescribed rent due to the rector" from the year 1637, with some interruptions; and also receipts for a payment of 8*s.* 9½*d.*, which was supposed to be a payment in respect of tenths due from the rector to the Crown:

Held, by the Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court to direct an issue to try the existence of the alleged modus, the evidence against it being free from doubt.—*Cairns v. Raine*, 12 Cl. & F. 833.

A landowner is not, like a rector, entitled as of right to such an issue.—*Id.*

MORA. See INTEREST.**MORTGAGE. See CONTRACT, 23. FRAUD. PRACTICE, 11. SALE.**

1. A mortgagor in *Ireland* tendered payment of interest to the agent of the mortgagee. It was not accepted. The mortgagor filed a bill against mortgagee and agent to compel acceptance of the interest. The suit was allowed to drop. Twenty-four years afterwards the representative of the mortgagee filed a bill against the mortgagor for an account and payment or foreclosure and sale:

Held, that the plaintiff was entitled to maintain the suit, and payment of principal and interest for the whole time was decreed.—*Meade v. Bandon (Earl)*, 2 Dow, 268.

See *Christopher v. Sparkes*, 2 Jac. & W. 223, 235; *Joy v. Birch*, 4 Cl. & F. 57.

2. No agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease), where the mortgage continues, ought to stand, if impeached within a reasonable time.—*Hickes v. Cooke*, 4 Dow, 16.

MORTGAGE—continued.

But if such a lease is made, and is allowed to stand for a great many years, acquiescence renders it incapable of being inspected.—*Hickes v. Cooke*, 4 Dow, 16.

See *Ford v. Olden*, L. R., 3 Eq., 461.

3. A Father, tenant for life, borrows money, to secure which he and his son, the remainder-man in fee, join in a mortgage of the inheritance. The son is entitled in equity to rank as a creditor, on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost for it for the son's relief, &c. &c.—*Rosse (Earl) v. Stirling*, 4 Dow, 442.
4. *M. Cormick*, first tenant in tail under the will of his father, *R. C.*, deceased (by which will estates in tail male in remainder were given to the deviser's other sons, *F. C.* and *T. C.*), before suffering a recovery, executes a settlement on his marriage, by which he limits an estate for life to himself, with remainders to the first and other sons of the marriage, in tail male, remainders successively to his brothers, *F. C.* and *T. C.* for life, with remainders to their first and other sons in tail male; and afterwards suffered a recovery, mortgaged the settled estate to *R. Plaistow*, and died without issue male. *C. Cormick*, son of *T. C.* (*F. C.* having died without issue), enters upon the estate, suffers a recovery and dies, leaving *M. C.*, the appellant, his eldest son.

Bill of foreclosure by *Plaistow*, resisted by *M. C.*, the appellant, the question being whether *C. Cormick*, the appellant's father, was entitled under the will of *R. C.*, or only as a volunteer under the settlement by *M. C.*, the first tenant in tail. Foreclosure decreed below. Argued in *Dom. Proc.*, that as the settlor had not the fee, but was only tenant in tail at the time of the settlement executed, the provisions of the statutes 13 *Eliz.* c. 5, and 27 *Eliz.* c. 4, enacted for *Ireland* by 10 *Car.* 1, sess. 2, c. 3, did not apply to this case. Answered, that there was no sub-

MORTGAGE—*continued.*

stantial distinction between a tenant in fee and a tenant in tail, who had it in his power at any time to acquire the fee; that the brothers and their sons took new estates under the settlement, which were voluntary, and void as against the subsequent mortgagee for value. So held, and decree affirmed.—*Cormick v. Trapaud*, 6 Dow, 60.

See *Croker v. Martin*, 1 Dow & C. 15; *Spread v. Newe*, Cas. temp. Nap. 537; *Dickinson v. Wright* 5 H. & N. 405; 6 H. & N. 854; *Spread v. Morgan*, 11 H. L. Cas. 588.

5. A father, in contemplation of almost immediate death, wishing to make a larger provision for a daughter than he had done by his will, delivers to her a bond and some mortgage securities. This is a good *donatio mortis causa*, and the heir or executor is bound to give effect to the intent of the donor.

Per *Eldon* (Earl of): This is the first absolute decision on the question.—*Duffield v. Hicks*, 1 Dow & C. 1.

6. Where a tenant, having mortgaged his lease, has neglected to pay rent and costs, or file his bill, according to the provisions of the Tenantry Acts, within six months from the time of execution executed on an ejectment brought by the landlord, the mortgagee has a farther period of three months within which he may, by payment of rent and costs, or filing his bill and lodging the money in Court, save the lease from forfeiture.—*O'Reilly v. Featherston*, 2 Dow & C. 39.

See *Galbraith v. Cooper*, 8 H. L. Cas. 315.

7. An expectant heir, under pecuniary pressure, mortgaged his reversionary estate, and entered into other obligations to secure payment of goods, purchased at the shop prices, with the intention of selling or otherwise disposing of them for the purpose of obtaining money to supply his immediate wants; his father, the tenant for life of the estate so mortgaged, was privy to the transaction, and did not dissent; the expectant

MORTGAGE—*continued.*

heir on receiving the goods, so dealt with them that they could not be restored to the mortgagee:

Held, by the Lords, affirming the decree of the Court below, that such heir had no equity to have the transaction rescinded, or to be relieved against the securities.—*King v. Hamlet*, 3 Cl. & F. 218.

See *Savery v. King*, 5 H. L. Cas. 627; *Bromley v. Smith*, 26 Beav. 648; *Talbot v. Staniforth*, 31 L. J. (Ch.), 197.

8. The Irish firm in which *G. R.* was partner, became insolvent in 1804, owing *N. & Co.* upwards of 120,000 *l.* in respect of transactions, some of which were prior in date to *G. R.*'s partnership. In the accounts of those debts produced by *N. & Co.*, the sum of 10,000 *l.* secured by the bonds of *G. R.*, was charged against the firm. A composition was entered into for 42,000 *l.*, whereof 10,000 *l.* were to be paid by *G. R.*, who gave a mortgage on his estate to secure the same. The remaining 32,000 *l.* were otherwise secured, and therefore *N. & Co.* executed a release to the firm, releasing them and *every or any of them* from all claims or demands by *N. & Co.*:

Held, by the Lords (reversing on a former appeal a decree of the Lord Chancellor of Ireland), that the said mortgage was not a substitution for the securities by the bonds, &c., and that the release did not extend to the balance due on the bonds.—*Noel v. Rochfort*, 4 Cl. & F. 158.

9. *B.* mortgaged certain premises to *L.* The premises were required to be partly pulled down and rebuilt. *P.* undertook to perform the work, but required security for the payment. An agreement was entered into between *B.*, *L.*, and *P.*, by which *L.* consented to become tenant of part of the premises when rebuilt, and to take a lease of them from *P.*, to whom *B.* had assigned his interest for a term of years, and to pay *P.* 1000 *l.* for the lease, and 250 *l.* a year for rent. The premises having been rebuilt, *L.* entered into possession; but as no lease was granted by *P.*,

MORTGAGE—continued.

did not pay the 1000*l.* nor the 250*l.* a year rent. In a suit afterwards instituted by *P.*, and to which both *B.* and *L.* were parties:

Held, that *L.* was a mere tenant, and though at the same time a mortgagee, was not mortgagee in possession, the possession being in respect of the tenancy, and not of the mortgage, and the agreement not having the effect of changing the relative situation of the parties in that respect.—*Page v. Linwood*, 4 Cl. & F. 399.

10. By a settlement made on the marriage of *A.*, certain premises were assigned to trustees for his use for life, and power was also given to him "to raise by deed, mortgage, or any other writing a sum of 1000*l.*, to be applied to any purpose that the said *A.* should please, but the same was not to be raised by way of sale of the said lands;" and *A.*'s wife had a jointure secured on these premises. *A.* raised the 1000*l.* by mortgage of the settled premises, and afterwards became bankrupt. His assignee sold his interest, as such assignee, in the settled premises to *B.*, who also purchased the mortgage. *A.* afterwards died:

Held, that by this assignment of *A.*'s estate and interest in the premises, *B.* became entitled to hold the mortgage as a first charge upon the estate, as well after as before the death of *A.*, and until, by payment of principal and interest, it should be satisfied.—*Simpson v. O'Sullivan*, 7 Cl. & F. 550.

11. A lessee having been evicted for non-payment of rent, under the ejectment statutes in *Ireland*, an equitable mortgagee of his interests filed a bill for redemption against the landlord:

Held, 1st, that the mortgagee was entitled under the earliest of these statutes (11 *Ann.*, c. 2) to redeem the evicted premises; and 2nd, that trustees of a settlement to whom the lease had been assigned, were not necessary parties to the suit.—*Gerahy v. Malone*, 1 H. L. Cas. 81.

12. *H. C.* mortgaged the entirety of free

MORTGAGE—continued.

hold, and part of copyhold, hereditaments, to secure payment of 6500*l.* *M. C.*, who was the owner of two-thirds of the freehold, received two-thirds of the 6500*l.*, and he and his wife joined in collateral securities for payment of the whole sum. *H. C.* afterwards paid 500*l.* of the mortgage debt, and subject thereto, conveyed his one-third of the freeholds to secure payment of 12,000*l.* *M. C.* subsequently mortgaged his two-thirds of the freehold hereditaments to secure payment of 2106*l.* The first and last mortgages were assigned to *G. B. T.*, who filed his bill for redemption or foreclosure:

Held, affirming the decree of the Vice-Chancellor of *England*—

1. That *G. B. T.* was not entitled to tack the last mortgage to the first.

2. That the accounts of the rents and profits of the mortgaged premises, possessed by *G. B. T.*, should be taken against him with annual rests, if they should be found to have exceeded the interest on the mortgages. The separate estate of *M. C.*'s wife was not affected by her joining in the securities.—*Thornycroft v. Crockett*, 2 H. L. Cas. 239.

See *McDonnell v. White*, 11 H. L. Cas. 570.

13. A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances. *Diss.* Lord *Cranworth*.—*Hopkinson v. Rolt*, 9 H. L. Cas. 514.

The case of *Gordon v. Graham*, as reported 2 Eq. Cas. Abr. 598, pl. 16; 27 Vin. Abr. 52, pl. 3, discussed and overruled.—*Id.*

14. *John S.* entered into an agreement with *E.* for securing payment of sums of money owing by him to *E.* In this agreement there was a covenant (amongst others) that *John S.* would give to *E.*, as part of the securities, a mortgage on the lots of

MORTGAGE—*continued.*

a particular estate, and *James S.*, the brother of *John S.*, therein described as being the owner of lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which *John S.*, *E.*, and *James S.* were parties, after reciting the first agreement, *John S.* covenanted that he would, before a certain time, convey, or cause to be conveyed, to *E.*, lot 1, to be held by *E.* in fee: "And it is hereby agreed by and between the parties hereto," that if *John S.* shall pay *E.* the monies due to him, *E.* shall re-transfer "all securities of whatever nature or kind." Provided, that if payment shall not be made, *E.* may by "entry, foreclosure, sale, or mortgage of any part or parts of the said lands," &c., levy the deficiency. "And each of them, *John S.* and *James S.*, for himself, his executors," &c., covenanted to pay any deficiency, so that out of the interest or dividends on railway shares (previously deposited), or by cash payments of *John S.* or *James S.*, there should be received a certain sum every year. All the three parties duly executed this agreement:

Held, that this amounted to an equitable mortgage binding on the estate of *James S.*—*Eyre v. McDowell*, 9 H. L. Cas. 619.

15. *E.* was the holder of a mortgage given him by *John S.*, who was largely his debtor. *John S.* afterwards mortgaged the lands to the directors of a banking company, as security for existing debts, and for some fresh advances. Before these advances were actually made, the solicitor for the directors discovered that the lands had been previously mortgaged to *E.* The directors refused to complete the transaction with *John S.* unless *E.*'s interest in the lands was released. *John S.* represented to them that it would be easy to procure the release, as *E.*'s mortgage was only a collateral security; he applied to *E.*, who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between *E.* and *John S.*, the latter pretended to give substituted

MORTGAGE—*continued.*

securities, among others, railway shares and a promissory note. The release was executed by *E.* The substituted securities, the shares, and the note proved to be forgeries:

Held, reversing the decree of the Court below, that *E.* had not, by executing the release, lost his right against the mortgaged lands, the release having been obtained from him by fraud; that even if *John S.* had conveyed the released lands to the directors, they could only have claimed under him against *E.*; and that the release valid against *John S.*, and those who claimed under him, was invalid as against *E.*, who claimed not only not under *John S.*, but against him by title paramount.

It was ordered that if any of the securities taken by *E.* when he executed the release, were valid, they were to be taken into consideration in the accounts.—*Eyre v. Burmester*, 10 H. L. Cas. 90.

16. A contract, for the sale or mortgage of future acquired property, if capable of specific performance, transfers to the vendee or mortgagee the beneficial interest in the property as soon as it is acquired.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

T. was the owner of certain machinery in a mill; it was purchased by *H.* but not removed, and *T.* continued in possession. *T.* executed a mortgage (which was duly registered), by which it was declared that the machinery was the property of *H.*, that *T.* desired to repurchase it for 5000*l.*, but had not the money to pay for it, wherefore it was conveyed to *B.* in trust, when *T.* should pay the money, to transfer it to him, and if he did not pay the money to hold it absolutely for *H.* The deed contained a covenant by *T.* to insure the machinery, and another covenant that all the machinery which during the continuance of the deed should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. *T.* sold some of the original machinery, purchased new machinery, and sent to *H.* accounts of these sales and purchases, but nothing

MORTGAGE—continued.

was done by or on behalf of *H.* to take possession of the newly purchased machinery. On the 2nd April, 1860, *H.* served *T.* with notice of a demand for payment of the 5000 *l.* An execution against *T.* was afterwards put in by a creditor :

Held, that though there had been no *novus actus interveniens*, the title of *H.* was preferable to that of the execution creditor, as to the new as well as the old machinery.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

Mogg v. Baker, 3 Mee. & Wels. 195, commented on.—*Id.*

17. Where money is entrusted by *A.* to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to *A.* If the solicitor afterwards misapplies the money, and, to cover his fraud, obtains from another client, *B.*, upon a false representation, a transfer of *B.*'s equitable interest under a previously executed mortgage, no money of *A.* being then paid to *B.*, the transfer thus obtained may, on *B.* discovering the fraud, be set aside in equity, for no money of *A.* having been received by *B.* at the time the transfer was executed, no interest passed to *A.* by its execution.—*Wall v. Cockerell*, 10 H. L. Cas. 229.

18. A mortgage made subsequent to a contract for the sale of an estate, conveys to the mortgagee only that which the vendor is entitled to under that contract. If the mortgagee gives no notice of an intention to interfere with the contract, its stipulations remain as before, and affect the mortgagee as they would have affected the mortgagor.—*Rose v. Watson*, 10 H. L. Cas. 672.

The owner of an estate, part of which was then subject to a contract for sale, executed a mortgage upon it. The mortgagee gave to the vendee notice of the fact of the mortgage, but in all other respects left matters as they were before the mortgage. The vendee was bound by his contract to pay certain sums at stated intervals, together with interest on all that remained unpaid. He made

MORTGAGE—continued.

several of these payments, but at length declined to complete the purchase on the ground that the representations on which he had been induced to enter into the contract for purchase were unfulfilled :

Held, that (these representations having been previously held to be sufficient to absolve him from liability to specific performance) he was entitled, so far as the payments extended, to claim a *lien* on the estate for their amount, and to enforce that claim against the assignees of the vendor.—*Rose v. Watson*, 10 H. L. Cas. 672.

19. Payment of interest on an *Irish* mortgage made by a receiver appointed under the 11 & 12 Geo. 3, c. 10 (*Ir.*), over the estates mortgaged, is, within the terms of the 40th section of 3 & 4 Will. 4, c. 27, payment by "an agent" of the party liable.—*Chinnery v. Evans*, 11 H. L. Cas. 115.

M. was possessed of estates in three counties, *Cork*, *Kerry*, and *Limerick*. In 1776 he mortgaged them to *F.* The interest on the mortgage was not regularly paid, and, on a petition presented by *F.*, under the 11 & 12 Geo. 3, c. 10 (*Ir.*), a receiver was appointed. In form, his appointment embraced the three estates; in fact, he never entered into possession of any but the *Limerick* estate, from which alone he took the money necessary to keep down the interest on the mortgage. *M.* afterwards (without any knowledge of the matter on the part of *F.*) sold the *Cork* and *Kerry* estates to *C.*, and certain outstanding terms and judgments were assigned and conveyed to a trustee for *C.*, to protect the title. After the lapse of nearly 20 years, since the last payment made by the receiver, *F.* claimed to have a sale of all the estates included in the original mortgage, in order to cover arrears of interest :

Held, affirming the judgment of the Court below, that the payment by the receiver out of the rents of the *Limerick* estate, was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations

MORTGAGE—continued.

operating as a bar to the demand as to any of the estates comprised in the mortgage.—*Chinnery v. Evans*, 11 H. L. Cas. 115.

The assignment to a trustee for the purchaser of an estate, of outstanding terms affecting it, and of judgments on which elegits had been issued, does not constitute the purchaser an incumbrancer within the meaning of the 42nd section of the 3 & 4 Will. 4, c. 27, so as to prevent the operation of the statute on the claim of the mortgagees :

Held, therefore, reversing the judgment of the Court below, that the mortgagee was only entitled to demand six years' arrears of interest up to the filing of his petition, in which the holder of the estate was, for the first time, made a party to the suit.—*Id.*

MORTMAIN. See CHARITY.

1. *D. M.*, a native of *Montrose*, but residing in *England*, by a will made in *England* and in the *English* form, bequeathed the residue of his real and personal estate to trustees to be laid out in the purchase of lands or rents of inheritance in fee simple, for a charitable purpose at *Montrose* in *Scotland*, where two of the four trustees resided, a third residing in *England*, and the fourth in the *West Indies* :

Held (by the Lords affirming a decree of the Court of Chancery), that the bequest was void by the Statute of Mortmain, it not appearing from the will that the testator intended that the trustees should have the option of purchasing lands in *Scotland*.—*Attorney General v. Mill*, 2 Dow & C. 393.

2. The 9 Geo. 2, c. 36 (the Mortmain Act), is a prohibitory, not a penal statute.—*Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

Prohibitory statutes must not be interpreted on a principle of tendency ; if anything done is substantially that which is prohibited, the thing done is void, not because of its tendency, but because it is within the true

MORTMAIN—continued.

construction of the statute the thing prohibited.—*Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

B. devised to *S.* a piece of land in *N.* ; *B.* then declared his desire to erect and endow almshouses in *N.*, and he empowered his trustees "so soon as land in *N.* shall have been legally dedicated to charitable uses" by some other person, within twelve months after his decease to pay to the trustees of the intended charity a sum of 60,000*l.*, to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for the same :

Held, reversing the judgment of the Court below, that this bequest was not void under the Mortmain Act.—*Id.*

3. The Mortmain Act, 9 Geo. 2, c. 36, does not extend to *New South Wales*.—*Whicker v. Hume*, 7 H. L. Cas. 124.

A. being possessed of some pure personality, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named the sum of 60,000*l.*, to be invested in their names on the trusts thereby declared : the trusts were charitable trusts. This deed was never enrolled in Chancery. On the same day he made a will giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from his drawers, and handed them to the persons attending his death-bed. They were tied up with a memorandum which declared that they had been prepared in that form, under advice, to save the legacy duties, and that if probate duty was paid in the first instance it might be got back again in consequence of the covenant creating a debt to be paid out of the assets :

MORTMAIN—continued.

Held, that the indenture was a deed, and not a testamentary paper.—*Jeffries v. Alexander*, 8 H. L. Cas. 594.

But held also, that so far as realty was to be affected, it was void within the Statute of Mortmain, 9 Geo. 2, c. 36. *Diss. Lords Cranworth and Wensleydale.—Id.*

Observations as to the object of the Statute.—*Id.*

The Attorney General v. Jones (3 Price, 368) questioned.—*Id.*

5. A deed executed under 9 Geo. 2, c. 36 (the Mortmain Act), is sufficient, if it is made to take effect so as to give a title to immediate possession of the land. Equity will thereon enforce the trustees' rights to all the profits of the land. It is not necessary that possession *de facto* should be had.—*Fisher v. Brierley*, 10 H. L. Cas. 159.

To defeat such a deed, it must be distinctly shown that there was an antecedent agreement between the donor and the trustees that the deed should not take effect upon execution, but should be deferred till the death of the donor, who should in the meantime retain the benefit of the property.—*Id.*

A small piece of land was granted by deed (duly executed and enrolled under the statute of Mortmain) for a charitable purpose which could only be carried into effect by funds being provided for that purpose. The deed itself was allowed to remain in the possession of the grantor, whose managing bailiff manured and mowed the land, as he did other land of the same kind belonging to the grantor, and either rented by himself or managed by him as bailiff, and the hay obtained from it was carried to the grantor's stables, and there consumed. The funds necessary for carrying into effect the purposes of the deed, were provided by the will of the grantor:

Held, that these circumstances did not show the existence of a reservation

MORTMAIN—continued.

or condition for the benefit of the grantor, such as would avoid the deed.—*Fisher v. Brierley*, 10 H. L. Cas. 159.

There was no provision in the deed for appropriating in any way the produce of the land, or the rent it might fetch, during the interval between the date of the deed and the time when its provisions might be carried into effect:

Held, that this did not constitute a resulting trust so as to avoid the deed.—*Id.*

MULTIPLEPOUND. See BILLS AND NOTES. INTEREST. PRACTICE.**MUTUAL COVENANTS.**

A. entered into a contract with B., by which A. was "forthwith" to bring a vessel alongside a particular wharf, and within seven days of his doing so, B. was to pay a sum of 1000*l.*; a farther sum of 2000*l.* in 21 days afterwards; and another sum of 2,000*l.* on the ship arriving at the *Nore*. Certain penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, and after them came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties "which he might incur under these presents, A. and two responsible sureties were, within 10 days from the execution of these presents," to execute a bond to B. in the penal sum of 5000*l.* There was a covenant in exactly similar terms on the part of B. The giving of the bond was not to prejudice their mutual rights and liabilities under the agreement:

Held, that the covenants to give the bonds were not mutual and dependent, but constituted a condition precedent, and that the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract.—*Roberts v. Brett*, 11 H. L. Cas. 337.

MORTGAGE—continued.

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Held, that the covenants to give the bonds were not mutual and dependent, but constituted a condition precedent, and that the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract.—*Roberts v. Brett*, 11 H. L. Cas. 337.

NAVIGATION. *See* FISHERY.

NEGLIGENCE. *See* ATTORNEY AND CLIENT. COSTS. PRACTICE. PRINCIPAL AND AGENT. REGISTRATION.

NEXT OF KIN. *See* DISTRIBUTIONS, STATUTE OF.

By the settlement made in the marriage of *E. M.*, the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." *E. M.* died, leaving her husband and a child of the marriage, and her own father and mother surviving:

Held (affirming a decree of the Master of the Rolls), that the father, mother, and child of *E. M.*, were equally her next of kin, and were entitled under the limitation, to the 10,000*l.* in joint tenancy.—*Withy v. Mangles*, 10 Cl. & F. 215.

NEW RULES. *See* PRACTICE.

If new rules are valid in themselves it is no objection to them that they affect suits then pending.—*Attorney General v. Sillem*, 10 H. L. Cas. 704.

NEW SOUTH WALES.

The Mortmain Act, 9 Geo. 2, c. 36, does not extend to *New South Wales*.—*Whicker v. Hume*, 7 H. L. Cas. 124.

The 9 Geo. 4, c. 83, s. 24, refers to the laws regulating the administration of justice in the Courts of *New South Wales*, and not to the general law of the colony.—*Id.*

NOTICE. *See* APPEALS. ASSIGNMENT. COSTS. OFFICE. PRACTICE. REGISTRATION. VESTRY.

1. A party interested in the subject-matter of a private Act of Parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him.—*Edinburgh Railway Company v. Wauchope*, 8 Cl. & F. 710.
2. Where notice to a party was required

NOTICE—*continued*

in certain proceedings under a Railway Act, the want of notice was held to be waived by the fact that the party to whom it ought to have been given appeared, and made no protest on account of the want of it.—*Taylor v. Clemson*, 11 Cl. & F. 610.

3. A debtor assigned his house and business, in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting:

Held, that a sale afterwards made by the trustees, without farther notice, was unauthorised and unlawful.—*Tommy v. White*, 3 H. L. Cas. 49.

NOVITER REPERTUM. *See* EVIDENCE.

NOVUS ACTUS. *See* MORTGAGE, 16.

NUISANCE. *See* EQUITY. INJUNCTION. PRACTICE.

1. If a plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right, or the fact of its violation, is denied, he must establish his right at law, but having done that, he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation.—*Directors of Imperial Gas Company v. Broadbent*, 7 H. L. Cas. 600.

For such a purpose the award of an arbitrator is equivalent to a verdict.—*Id.*

If between the time of the case being referred and the award being made there has been an alteration in the mode of carrying on the business complained of, it may, if in diminution of the cause of injury, be shown as an answer to the application for an injunction; but if in increase of the cause of injury, it need not be

NUISANCE—*continued*.

the subject of a fresh proceeding at law; that is matter for the discretion of the Court of Equity.—*Directors of Imperial Gas Company v. Broadbent*, 7 H. L. Cas. 600.

A plaintiff brought an action to recover damages for an injury to his business, occasioned by the erection of gas works; the action was referred to arbitration; nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award the injunction was applied for:

Held, that there had not been any such acquiescence as to deprive the plaintiff of his right to the injunction.—*Id.*

The 68th section of the (8 & 9 Vict. c. 18) "Land Clauses Consolidation Act" applies only to things done under the powers conferred by the legislature. For anything else the Common Law remedy is properly applicable.—*Id.*

2. There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and of the trades carried on around him; as to the former, the same rule would not apply.—*St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642.

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighbourhood.—*Id.*

A place where the works of one person are carried on which occasion an actionable injury to the property of another is not within the meaning of the law, "a convenient" place.—*Id.*

NUISANCE—*continued*.

A. bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on A.'s estate. At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property; that locality, and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights:

Held, that the direction was right.—*St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642.

NUN.

Quære, whether an assignment of property by a nun (in pursuance of a vow made on entering the convent), is valid?—*Fulham v. McCarthy*, 1 H. L. Cas. 703.

OATH.

By the statute 4 Anne, c. 14 (*Ir.*), a person appointed to the office of weighmaster in a town, is required to take certain oaths provided by the statute 3 Will. & Mary, c. 2. These could not be taken by a Roman Catholic. This office must now be taken to be included in "all offices and franchises" mentioned in 10 Geo. 4, c. 7, s. 21, and therefore the oath prescribed by that statute is to be taken in substitution for the oaths prescribed by the earlier statutes. But this oath must be taken in reference to the appointment to the office, and the having taken it as a barrister previous to

OATH—*continued.*

such appointment does not relieve the appointee from the necessity of proving that he took it before entering upon his office.—*M'Mahon v. Lennard*, 6 H. L. Cas. 970.

OCCUPATION AS TITLE TO PROPERTY. *See* GAME.OFFICE. *See* CHARTER. CORPORATION. OATH.

1. The rules of law applicable to the managers of a public establishment do not apply to one formed and maintained from private funds, though it may be formed and maintained under a royal charter of incorporation.

The appointment to an office in a private establishment is not therefore necessarily an appointment *ad vitam aut culpam*, but depends in each instance on the particular circumstances under which it was made.—*Gibson v. Ross*, 7 Cl. & F. 241.

2. On the true construction of the general Turnpike Road Acts for *Scotland* (4 Geo. 4, c. 49, and 1 & 2 Will. 4, c. 43), the clerk appointed by trustees of district roads under a local Act, may, as their representative, sue and be sued on their account in his own name; and he is the proper person to bring an action against their treasurer's sureties for payment of balances due from the treasurer.—*Creighton v. Rankin*, 7 Cl. & F. 325.

Quære, whether the trustees can authorise their clerk so to sue or defend, independently of the statutory provisions? For if by the rule of practice in the *Scotch* Courts (which constitutes the law of *Scotland*, and therefore is not to be disturbed on appeal without full inquiry into the grounds of it), a party having himself a right to sue, can enable another to maintain a suit in such other person's name without assigning to him the subject-matter of the suit, consequences inconsistent with the principles of justice would flow from such practice.—*Id.*

The treasurer appointed by district road trustees having absconded with the trust funds :

OFFICE—*continued.*

Held (affirming the judgment of the Court below), that a cautioner for the faithful discharge of his office, was liable to the trustees for the balances due from the treasurer, although at several prior audits of his accounts they were guilty of neglect of their duty by allowing him to retain in his hands balances far exceeding the amount allowed by the terms of the bond of caution, without requiring payment, and without notice to the cautioner.—*Creighton v. Rankin*, 7 Cl. & F. 325.

The rule as to the liability of sureties in a bond is the same in *Scotland* as in *England*, viz., that they are not to be discharged from their obligations unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. It is the duty of a surety to see that his principal does his.—*Id.*

3. The *Edinburgh* Police Act, 2 Will. 4, c. 87, does not make the commissioners responsible, through their collector, for the misconduct of one of the police constables.—*Thomson v. Mitchell*, 7 Cl. & F. 564.

4. A. executed a deed, conveying and assigning his property to trustees, for the benefit of creditors. The operative part of the deed was in these words: "All and sundry superiorities, lands and heritages, debts, heritable and moveable, and whole goods, gear, sums of money, and effects; and in general, my whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, presently belonging to me:"

Held, that these words did not pass the profits of a public office at that time filled by the grantor. *Semble*, that the profits of a public office cannot be assigned for the benefit of creditors.—*Hill v. Paul*, 8 Cl. & F. 295.

5. The convention of the royal burghs of *Scotland* exists under the authority of an Act passed in the reign of James III. (A. D. 1487). It consists of commissioners or delegates from the

OFFICE—continued.

royal burghs, meets annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjunct clerks of this convention, and their appointments were declared to be "with benefit of survivorship," and with "survivancy to the longest liver of them," and the office was given to them "as freely and fully as any of their predecessors had held it;" and the emoluments were declared to belong to one of them "during his natural life;" the other was to have the benefit of survivorship. The convention in one year raised the salary of its clerks, in another it lowered that salary below its original amount, and it also increased their duties. There were instances of express appointments "during pleasure," and of dismissals:

Held, by Lords *Brougham* and *Cottenham* (Lord *Campbell* dissenting):

1. That this was not a life office; that the expressions in the appointment were explained by the circumstances under which it was made:

And 2. That the salary might be raised or lowered at the pleasure of the convention.

Per Lord Campbell: The convention of royal burghs is a corporation: on the facts of this case, and the terms of the appointment, the office is granted for life, and the convention cannot reduce the salary below its ancient and original amount. But the convention can reduce it to that amount, and may, perhaps, cast new duties on the officers.—*The Convention of Royal Burghs of Scotland v. Cunningham*, 9 Cl. & F. 144.

6. The office of chamberlain and collector of revenues payable to the Crown out of *Ettrick Forest*, was granted by *Geo. IV.* to Lord *D.* for his life, with a yearly salary, "as well in consideration of the office as out of Royal bounty and favour," to be paid out of the monies of the collection, and if they should be insufficient, out of the Crown reve-

OFFICE—continued.

nues of other lands in *Scotland*. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *George IV.*

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension, to endure beyond the life of the Royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord Dinglas*, 9 Cl. & F. 173.

See *Corporation of London v. The Attorney General*, 1 H. L. Cas. 440; *Smith v. Officers of State for Scotland*, 2 H. L. Cas. 807.

7. An appointment to an office for the life of the appointer is not invalid upon the sole ground that the person making the appointment only holds his own office for life.—*Earl of Rosslyn v. Aytoun*, 11 Cl. & F. 742.

The holder of an office (the director of the Court of Chancery in *Scotland*) enjoyed the right of appointing a sub-officer; the 57 *Geo. 3*, c. 64, passed to regulate this and other offices, enacted that, that "upon the termination respectively of the present existing interests in the undermentioned offices," mentioning the office and sub-office, "and so soon as the said offices shall become vacant," the regulation of them shall be vested in the Lords of the Treasury. After the passing of the Act the sub-officer died, and the officer appointed another person and died:

Held, that on his death the sub-office became vacant; for the words "existing interests" in the statute did not mean the right of the holder of one office to appoint to another.—*Id.*

8. The office of weighmaster in a market town in *Ireland* is a freehold office, and the appointment to it ought to be for life. And the person appointed must take all the oaths required from such an officer, although he may previously have taken some

PARLIAMENT—continued.

justification for the defendant.—*Burdett v. Abbot*, 5 Dow, 165.

The Lord Chancellor considering it as clear in law that the House of Commons has the power of committing for contempt, and that this was a commitment for contempt, (Lord *Erskine* concurring), the judgment of the Court below was affirmed.—*Id.*

See *Wellesley's Case*, 2 Russ. & Myl. 661; *Stockdale v. Hansard*, 9 Ad. & El. 1; *Reg. v. Evans and Another*, 8 Dowl. 451.

PARTNERSHIP. See ASSIGNMENT. CONTRACT. INDEMNITY. MALICIOUS PROSECUTION. MINE. PRACTICE.

1. A partnership of two persons, *A.* and *B.*, existed; goods were sold to the partnership by persons who had no legal title to them. The real owner instituted a suit in the Court of Session to recover their value. *A.* compromised the suit by paying a certain sum of money. The partnership was dissolved. *B.* instituted a suit against *A.* to recover a sum of money to which he alleged himself entitled under the general partnership accounts. *A.* claimed to be repaid (as by way of set off) *B.*'s share of the money paid on the compromise. The Court of Session rejected the proof of the compromise, and the payment under it as made on the partnership account:

Held, that the proof must be allowed.—*Bruce v. Ogilvy*, 1 Dow, 38.

2. *A.* purchased a share in the *Edinburgh Glasshouse Company*. The laws of the company excluded partnerships as shareholders, and only recognised individuals in that character. *A.* was in partnership with *B.*, and the share really formed part of the partnership property, but *A.*'s name alone was registered with the company. The partnership of *A.* and *B.* was dissolved in 1796 by *A.* becoming bankrupt. Shortly after the bankruptcy *A.* borrowed money from *R.* and assigned the share to him, and gave notice to the company of the assignment. *B.* discovered this fact, and put in his

PARTNERSHIP—continued.

claim to the share as forming part of the partnership assets. In a conjoined suit of multipointing and reduction, the Court of Session decided in favour of the claim of *B.*, and adversely to that of *R.* under the assignment:

Held, that the judgment of the Court below was erroneous and must be reversed, for that a latent equity could not prevent the effect of an intimated assignment.—*Redfearn v. Ferrier*, 1 Dow, 50.

See *Spears v. The Lord Advocate*, 6 Cl. & F. 180.

3. *A.* and *B.* are partners; goods are purchased on the partnership account; *A.* gives one bill for the price, *B.* gives another, each bill being accepted for the firm. Each bill is put in suit by its holder. The partners raise a process of multipointing.

Semble, by Lord *Eldon* (Lord Chancellor), that where two or more bills are accepted by a firm, each of them for the whole price of an article furnished, and these bills get into the hands of *bonâ fide* holders for value, the firm is liable for them all, and consequently there can be no ground for the process of multipointing.—*Davison v. Robertson*, 3 Dow, 218.

4. *F.*, a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney; the proceeds were paid to the account of the bank, at the house of the bank's agent, and were appropriated by *F.*, who was afterwards executed for other forgeries. The partners of *F.* were ignorant of the fraud, but might, with common diligence, have known it:

Held, that the customer could maintain an action against the partners for money had and received.—*Marsh v. Keating*, 2 Cl. & F. 250.

See *The Bank of Ireland v. Trustees of Evans' Charity*, 5 H. L. Cas. 389; *Chowns v. Baylis*, 31 Beav. 351; *Williams v. Bayley*, L. R., 1 H. L., 200.

5. Two solicitors in partnership had a bill of costs and disbursements

PARTNERSHIP—*continued.*

against a client; one of the partners, after the dissolution of the partnership, continued to be the solicitor of the client, and received his rents, out of which he retained the amount of the partnership debt; and he stated that he did so on the understanding that the debtor should have credit for the sum so retained, and that he considered that debt to have been satisfied by the monies retained; but no account had been settled between him and the debtor, nor had he specific directions to appropriate the monies retained to the payment of the partnership debt:

Held, that as against the other partner, the debt to the partnership was not to be considered as satisfied.—*Nottidge v. Prichard*, 2 Cl. & F. 379.

6. *R. T.* and *A. T.* having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and some debts also owing from the partnership. *A. T.* entered immediately into partnership in the same business with *C.*, and it was agreed between them, but not in writing, that upon *A. T.*'s bringing into the new partnership 40,000*l.* of good debts owing from customers of the then late partnership, for the purpose of meeting claims of debts from that partnership, transferred to the accounts of the new partnership, *A. T.* should be entitled to two-thirds of the new partnership, and *C.* to one-third. This partnership business was carried on for 14 years without any settlement of accounts, or any entry in the books declaring the terms of the partnership. It appeared that within the first five or six years 40,000*l.* were received from the debtors of the former partnership, but not so much if the advances to them by the new firm were deducted from their payments:

Held, that 40,000*l.* of good debts were brought in according to the intent and spirit of the agreement.

Monies paid by debtors, without specifically appropriating them, are to be applied in discharge of their eldest

PARTNERSHIP—*continued.*

debts.—*Toulmin v. Copeland*, 2 Cl. & F. 681; and see *S. C.* again, 7 Cl. & F. 350.

See *Hunt v. Manicre*, 34 Beav. 161.

7. In 1799 *D. A.* purchased shares in a ship of *G. R.*, who retained other shares in the same, and was entrusted by *D. A.* and the other owners with the sole management of the ship, and with the keeping of the accounts. The ship was sold by *G. R.* in 1805, with the consent of the owners, and he received the proceeds of the sale, and settled accounts with *W.*, one of the owners, to whose credit a balance appeared to be placed in respect of the earnings of the ship, and the proceeds of the sale. In 1826 *D. A.* filed a bill against the administrators of *G. R.*, who died in 1824, for an account of *D. A.*'s share of the earnings and proceeds of the sale of the ship. In *G. R.*'s account books, which appeared not to have been referred to for several years, were two accounts with *D. A.*, one relating to the ship in the way of debit and credit from 1799 to 1805; the other containing two items only, in 1811 and 1812, on the debit side, not appearing to relate to the ship. *D. A.* was absent from *England* from 1820, after which time *E.*, his brother-in-law, a witness in the cause, "called frequently on *G. R.* with messages from *D. A.*, and asked him to come to a settlement of accounts with *D. A.* in respect to the ship; *G. R.* evaded the subject, but never stated or intimated that he was not indebted to *D. A.*":

Held by the Lords, affirming a decree of the Court below, that *D. A.* was entitled to an account of the dealings between him and *G. R.*, relating to the ship.—*Robinson v. Alexander*, 2 Cl. & F. 717.

8. *Semble*, that a bill to set aside a purchase may be maintained by some partner of a company, including the actual purchasers, without making all the partners parties, against a vendor who is not a partner, and *vice versa*.—*Atwood v. Small*, 6 Cl. & F. 232.

PARTNERSHIP—continued.

As to reading answers of co-defendants who are partners.—*Atwood v. Small*, 6 Cl. & F. 232.

9. Partners in a licensed distillery convicted of a breach of the revenue laws, consented to a mitigated penalty. It seems that a partner who was not a participator in the delict was legally entitled to indemnity from those who were, although he consented to the penalty.—*Campbell v. Campbell*, 7 Cl. & F. 166.

See *London and Eastern Banking Corporation*, 1 De G., F., & J. 32.

10. *R.* and *A. T.*, having carried on the business of navy agents, as partners, in equal shares, and *R.* having retired, leaving the partnership accounts unsettled, with balances due to the firm from his customers, *A. T.* took *C.* into partnership; the customers' accounts were transferred to the new partnership-books, and the business was carried on as before until *A. T.*'s death, without any agreement in writing, or settlement of accounts between these partners, or other evidence, to show their shares in the concern. On a bill being filed by *A.*, *T.*'s representatives against *C.* for an account, he stated that the agreement was if *A. T.* would bring into the partnership 40,000*l.* of good debts due from the customers to the former partnership, his share in the concern should be two-thirds, and *C.*'s one-third, otherwise they should have equal shares; and that in consequence of *A. T.*'s not bringing in the 40,000*l.* of good debts, the agreement was varied accordingly. There were entries in the accounts debiting the partners equally with the prices of wines purchased, and with losses on transactions in the public funds; and one witness said that *C.* directed him in *A. T.*'s presence, to make up the general partnership accounts in equal shares:

Held, that as it was established by a judgment in a former appeal, that the 40,000*l.* of good debts were brought into the new partnership, according to the agreement, the event in which it was to be altered never occurred; and as the accounts were uniform, and contained no evidence

PARTNERSHIP—continued.

of an alteration, the partnership was continued in the proportion of two-thirds to *A. T.*, and one-third to *C.*

Held also, that in taking the accounts between *C.* and *A. T.*, and between them and the former firm, the monies paid in by the customers of both firms, without specific appropriation or contract, were to be applied first in discharge of their debts to the former firm, according to the rule in *Clayton's* case, although *A. T.*, in an affidavit made by him in a suit between himself and *R.*'s representative, swore that it was agreed between him and *C.* that the advances to be made by them to the creditors should be first repaid out of their payments, and the surplus only in liquidation of their debts to the former firm.—*Copland v. Toulmin*, 7 Cl. & F. 350.

11. An *American* ship was fitted out in the port of *Liverpool*, and sent to the coast of *Africa* in 1806, on a joint adventure for trafficking in slaves. An *English* ship was sent at the same time, by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the *American* ship; security having been given to the admiralty that they were to be expended in trade on the coast of *Africa*. On the arrival of the two ships in the river *Congo* the arms and ammunition were transhipped on board the *American* ship, which was thereupon seized by a *British* privateer, and ultimately condemned as contraband:

Held, that the whole transaction was illegal, and that no action for contribution or account, in regard thereto, could be maintained by any of the parties concerned against the others.—*Stewart v. Gibson*, 7 Cl. & F. 707.

12. A *Scotchman* in *Calcutta* opened an account with a banking and agency house there in 1786, and died in 1810, having been insane from 1793. A partner in the house being in *Scotland* in 1812, enclosed in a letter to the customer's relatives there an account current with him from 1787 to 1810, signed by the firm, bringing out annual balances in his favour composed of annual accumulations

PARTNERSHIP—continued.

of Indian interest, the last balance expressed "to bear interest at 9 per cent. per annum." In 1835, the customer's relatives obtained administration of his estate, and prosecuted actions which had been before commenced in the Scotch courts, on the account current, against another partner, who joined the firm in 1793, and continued a partner through several changes till 1820, when he retired to his estates in Scotland; and they claimed interest at 9 per cent. upon the last balance in 1810, and upon the annual accumulations thereof since:

Held, by the Lords, first (concurring with the court below), that a debt was sufficiently constituted against the firm by the account rendered by them, together with interest at 9 per cent. on the last balance in 1810 down to final decree; and that one partner was bound by the account so rendered; secondly (differing from the Court below), that the debt did not carry compound interest from 1810.—*Fergusson v. Fyffe*, 8 Cl. & F. 121.

See *Bate v. Robins*, 32 Beav. 73; *Crosskill v. Boves*, 32 Beav. 86; *Mosse v. Salt*, 32 Beav. 269.

There cannot be a title to compound interest without a contract, express or implied, or a custom.—*Id.*

By the law of England, a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions.—*Id.*

13. A partnership composed of three persons, A., B., and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond two estates held by A. were specially named as part securities for these advances; A. died:

Held, that by his death the partnership was dissolved, and the securities so far as his estates were concerned, was no farther continued; no arrangement between the surviving partners, or between them and the bank for the purpose of settling the general accounts being capable of affecting that security. After the death of A. the bank continued as

PARTNERSHIP—continued.

before its dealings with the partnership, then constituted by B. and C., and at a certain period payments made to the bank entirely balanced the debt due to it at the time of A.'s death:

Held, that the separate liability of A.'s estates was thereby discharged.—*Bank of Scotland v. Christie*, 8 Cl. & F. 214.

B., the son and heir of A., within one year after his father's death, gave to the bank a heritable bond over his father's estates, for securing payment of advances to be made by the bank:

Held, that this was a bond for his own and not for his father's debts, and was consequently void under the Scotch Act of 1661, as a bond granted by the heir within one year of the ancestor's death.—*Id.*

14. Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the name of one of them, whose name alone was painted over the door of the business premises. The license also was taken out and the tickets and notes to the customers were issued in his sole name, while the other partner (carrying on another business) attended annually to inspect the books of the firm, and drew a per centage on his share of the capital out of the profits:

Held, that the agreement was for a secret partnership and was illegal, and therefore void as being contrary to the policy and prohibitions of the statute 39 and 40 Geo. 3, c. 99.—*Gordon v. Howden*, 12 Cl. & F. 237.

15. A. and B. may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners.—*Le Funn v. Malcomson*, 1 H. L. Cas. 637.

PATENT. See PRACTICE.

1. It is essential to the validity of a Scotch patent that the machinery or improvement for which it is granted should be new, in England as well as in Scotland. Accordingly, evidence of the use of an invention in England previous to the date of a patent

PATENT—continued.

for it in *Scotland* is admissible, and sufficient to make the patent void.—*Brown v. Annandale*, 8 Cl. & F. 437.

2. *N.* obtained a patent for the application of the principle of smelting iron by the use of heated air applied to furnaces. *B.* obtained a license from him to use this process, on the payment of 1 s. per ton on the iron thus smelted. Disputes, and then litigation, arose between them, and it was agreed by an instrument in writing, dated 11 November, 1833 (which recited the previous circumstances), that both parties should withdraw their law processes; that, "in consideration of the present payment of 400*l.* to be accepted by *N.* in full of 1 s. per ton on the whole iron smelted from the erection of *B.*'s works up to the 11th day of November, current, till the expiry of the letters patent, by the use of heated air in any of the modes heretofore applied, or in any other mode falling under the said patent," *N.* should grant to *B.* a license, which, farther on in the agreement, was described to relate to "the application or use of heated air in any of the modes heretofore practised at *B.*'s works, or in any other mode falling under the description in the said patent, or in the specification thereof." *N.* afterwards instituted a suit to compel *B.* to perform this agreement. *B.* instituted a cross suit to suspend *N.*'s proceedings, on the ground that the process of smelting by heated air, as used at *B.*'s works, did not fall within the patent:

Held, by the Lords, affirming the decree of the Court of Session, that after this agreement, *B.* could not set up such a defence to the claim of *N.*—*Baird v. Neilson*, 8 Cl. & F. 726.

See *Bovill v. Goodier*, 35 Beav. 427; *Crossley v. Dixon*, 10 H. L. Cas. 293.

3. A person, to be entitled to a patent for an invention must be the *first* and *true* inventor; and there must not be any public use thereof by himself or others, prior to the granting of the patent.—*Househill Coal Company v. Neilson*, 9 Cl. & F. 788.

PATENT—continued.

Trials of an incomplete invention, by way of experiment, are not evidence of "prior use" for the purpose of invalidating a patent. Prior use for that purpose, means public use and exercise of the invention.—*Househill Coal Company v. Neilson*, 9 Cl. & F. 788.

Evidence of the existence of a completed invention, once in public use, although abandoned or the use long discontinued, but not altogether lost sight of, is sufficient to invalidate a patent subsequently granted for the same invention.—*Id.*

Held, therefore, that on the trial of an issue "whether an invention described in a patent is not the original invention of the patentee," it is an erroneous direction in law to the jury to charge them that the evidence of prior public use, to invalidate the patent, must shew that "the use was continued to the time when the patent was granted; not to the very exact period, but that it must have been known and used as a useful thing at the time.—*Id.*

See *Unwin v. Heath*, 5 H. L. Cas. 505; *Betts v. Menies*, 10 H. L. Cas. 117.

4. A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen, and woollen fabrics." The specification and a disclaimer subsequently filed under the statute 5 & 6 Will. 4, c. 83, set forth that the patentees claimed "the mode hereinbefore described, of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side and into close contact with each other, and the re-weaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, &c." It appeared that one of these processes was old. The judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent:

PATENT—continued.

Held, that this direction was erroneous, and that the patent was void.—*Templeton v. Macfarlane*, 1 H. L. Cas. 595.

5. The assignees of letters patent may, under the 1st and 4th sections of the 5 & 6 Will. 4, c. 83, lawfully obtain a renewal of such patents.—*Ledsam v. Russell*, 1 H. L. Cas. 687.

The statute does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed.—*Id.*

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.—*Id.*

An application for a renewal is "prosecuted with effect," within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.—*Id.*

The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the original patent.—*Id.*

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, on an action for an infringement of the patent, aver that the condition was complied with before the patent was renewed.—*Id.*

6. Where a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances become, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent.—*Unwin v. Heath*, 5 H. L. Cas. 505.

PATENT—continued.

A. obtained a patent for an improved mode of manufacturing cast steel by the use of "carburet of manganese." This substance was well known, but was very expensive. At the time the patent was taken out, it was known that carburet of manganese might be obtained from the combination of two inexpensive articles, oxide of manganese and coal tar. Some little time after the patent had been in existence, it was found that if oxide of manganese and coal tar were put into the melting pot with the metal, cast steel would be produced equal to that which was produced by the aid of the "carburet of manganese." Some of the witnesses said that the carburet was produced in the melting pot at the instant of the fusion of all the ingredients therein contained:

Held, that the use of these two articles in that manner was not an infringement of the patent.—*Unwin v. Heath*, 5 H. L. Cas. 505.

7. In an action for an alleged infringement of a patent where the defence is that the supposed invention is not new, the judge may compare the plaintiff's specification with the specification of a previous patent, and may on such comparison direct the jury to find a verdict.—*Bush v. Fox*, 5 H. L. Cas. 707.

B. took out a patent, which he described as relating to "means and apparatus for working under water, in order to produce excavations and building foundations of light houses, piers, jetties, and other structures under water." There had been a previous patent taken out by another person, for "An apparatus to facilitate excavating, sinking, and mining." On comparing the two patents, the judge at the trial was of opinion that both claimed substantially the same invention. The evidence showed some difference in the mode of working, but the witnesses said that both patents had substantially the same object. The judge thereon directed a verdict to be found for the defendant:

PATENT—continued.

Held, that the direction was right.
—*Bush v. Fox*, 5 H. L. Cas. 707.

8. The plaintiff took out a patent for an improvement in the machine used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:

Held, that, taking these two instruments together, they sustained the patent. *Dub. Lord Wensleydale*.—*Seed v. Higgins*, 8 H. L. Cas. 550.

The particular manner described was by the use of "a weight." Certain other persons employed a machine similar in many respects, but, though using weight, or pressure occasioned by weight, as a force, not using "a weight":

Held, that this did not amount to an infringement of the plaintiff's patent, and that the judge, on seeing this distinction, ought (*dub. Lord Campbell, Lord Chancellor*) to have directed the jury to find for the defendant.—*Id.*

9. Where two specifications, of different dates, relating to the same external objects, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same, without the meaning and use of the terms of art employed therein being first ascertained by evidence, and being shown to be the same at the date of both the specifications.—*Betts v. Mensies*, 10 H. L. Cas. 117.

An antecedent specification declaring a principle, but not disclosing a practicable mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the groundwork for a valid patent.—*Id.*

PATENT—continued.

D. in 1804 took out a patent for making "a new article of trade, which I denominate *Albion* metal, and which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "and other things which are required to be made of a flexible," &c., substance. *D.* stated in his specification the principle of his invention, and that he proposed to unite lead and tin by pressure, but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on. In 1849, *B.* took out a patent for "A new manufacture of capsules, and of a material to be employed therein, and for other purposes." The new material was to be composed of lead and tin combined. *B.* specified the proportions of the two metals, gave the details of the mode of working in order to combine them, and did not claim the production of the new material, except according to the directions he had given for its production:

Held, that this was not a case in which the Court, looking at the two instruments, could determine the validity of the latter patent as a matter of construction only, that evidence must be resorted to, and that then it was apparent that the earlier patent only stated a principle, and that the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid.—*Betts v. Mensies*, 10 H. L. Cas. 117.

10. While a person is using, under a license, a patent machine and paying a royalty for its use, or the use of its principle embodied in any other machine, he cannot, in a proceeding against him for non-payment of royalties in respect of the use of another machine alleged to embody the principle of the patent invention, set up as a defence that the patent is not valid. He can only be allowed to contend that the second machine does not embody the principle of the patent.—*Crossley v. Dixon*, 10 H. L. Cas. 293.

D. had verbally agreed with *C.* to be

PATENT—*continued.*

supplied by *C.* with machines constructed according to patents of which *C.* was the owner, and to pay royalties for the use of such machines, and for the use of any machines supplied to him by anybody else which embodied the principle of *C.*'s patents. *D.* was afterwards supplied by *S.* with machines, on the use of which *C.* claimed a royalty, as embodying the principle of his patents, and he also charged *D.* with an infringement of the patents. *D.* denied first that the agreement amounted to a license, secondly, that the patents were valid, thirdly, that there had been any infringement. The Vice Chancellor made a decree in favour of *C.*, directing an inquiry only on the question of infringement. The Lords Justices retained the decree, but directed the appeal to stand over till *C.* had brought "any action he might be advised :"

Held, that this order was erroneous, that the verbal agreement must be treated as a license; that *D.*, while he continued to act under the license, could not dispute the validity of the patents, and that, with a variation of some words in the Vice Chancellor's decree, it must be restored.—*Crossley v. Dixon*, 10 H. L. Cas. 293.

That decree had declared that "the defendant is not entitled to use any machine in the construction of which the plaintiff's inventions, or inventions only colourably different from them, would be employed, without paying the royalty as if the carpet had been manufactured by a machine of the plaintiffs." This was varied by introducing before the words "is not entitled," these words, "during the continuance of the agreement between the defendant and the plaintiffs."—*Id.*

11. The object of the 5 & 6 Will. 4, c. 83, was only to permit a disclaimer to amend the specification of a patent, by removing from it something superfluous, but not to allow the introduction of that which would convert a description, in itself unintelligible or impracticable, into a

PATENT—*continued.*

practicable description of a useful invention.—*Ralston v. Smith*, 11 H. L. Cas. 223.

The words "not being such a disclaimer as shall extend the exclusive right," do not mean in the ordinary sense of the word "extend," merely adding to or enlarging the original specification, but are also intended to describe, so confining and restricting its expressions as substantially to amount to a statement of something new.—*Id.*

It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture," in the statute 21 James 1, c. 3, will comprehend not only a production, but the means of producing it.—*Id.*

R. took out a patent for "Improvements in embossing and finishing woven fabrics, and in the machinery and apparatus employed therein." In his specification he said, "I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design;" he caused this roller to revolve with a bowl at unequal velocities, moving the fabric transversely when fed into the machine, and by these means he proposed to calender or finish, and to emboss the fabric by one process instead of two, as then practised. He afterwards entered a "disclaimer," in which he disclaimed the words in the title, "and in the machinery or apparatus employed therein," disclaimed the word "wood" from the description of the roller, and restricted the grooves or flutes on the roller to those of a circular kind. Any other grooves would not only not produce the desired effect on the fabric, but would destroy it:

Held, that the original specification read with the disclaimer did not describe anything which could properly be the subject of a patent such as he had taken out.—*Id.*

Held, also, that the disclaimer here, by extending the exclusive right, had done what the statute did not intend to allow, and consequently was bad, and the patent could not be supported.—*Id.*

PATENT—continued.

One object of the invention was to enable the operations of calendering and embossing to be done at one and the same time.

Quære, whether, looking at the facts of the case, the patent (supposing the specification and disclaimer had been correct) might not have been maintained, if it had been taken out for a new mode of using the machinery and apparatus employed in embossing and finishing woven fabrics?—*Ralston v. Smith*, 11 H. L. Cas. 223.

12. Where there are two things similar in form, used for a similar object, and capable of the same application, one of them having been long known to mechanics, the introduction of the other into use will not constitute a good ground for a patent.—*Harwood v. Great Northern Railway Company*, 11 H. L. Cas. 654.

A slight difference in the mode of application is not sufficient for such a purpose; nor will it be sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied.—*Id.*

The use of "fishes" as supports was known, and the use of "fishes" made with a groove or recess in their outer surface, was also known. A person took out a patent, which he thus described: "My invention consists in forming a recess or groove in one or both sides of each fish, so as to reduce the quantity of metal at that part, and to be adapted to receive the square heads of the bolts, which are thus prevented from turning round when the nuts are screwed on." His claim was "for constructing fishes for connecting the rails of railways, with a groove adapted for receiving the ends of the bolts or rivets employed for securing such fishes; and the application of such fishes for connecting the ends of railways in manner hereinbefore described. The constructing of fish joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts or nuts, or rivets, and having projecting wings firmly secured to and

PATENT—continued.

resting upon the sleepers or bearers, so as to support the rails by their sides and upper flanges." It was proved that before the date of his patent, fish-joints had been used to connect and strengthen the rails of railways. In some cases the fishes were flat pieces of iron, with round holes for bolts, the heads of the bolts being held in their places by separate means. In others the extreme ends of the holes were made square, and the bolt-heads square, to put into them, and, in some, square recesses were made in the flat pieces of iron for the same purpose; but till the time of the patent, fishes for connecting the rails of railways had never been made with a groove in their lateral surfaces so as to receive the square heads of the bolts, and render the fish lighter for equal strength, or stronger for an equal weight of metal:

Held, that the patentee had merely transferred a known thing from one use to another, and an analogous use, and that what he claimed as his invention was not a good ground to sustain a patent.—*Harwood v. Great Northern Railway Company*, 11 H. L. Cas. 654.

PAWNBROKER. See PARTNER, 13.

PAYMENT INTO COURT.

Monies paid for the use of a railway company, under protest as overcharges, were afterwards paid into Court under an order made by consent, and vested in the public stocks, to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal:

Held, that the party who paid the monies was entitled to the stocks and dividends and accumulations thereof.—*Barrett v. The Stockton and Darlington Railway Company*, 1 H. L. Cas. 18.

PEACE, CLERK OF THE.

The right of direct appointment to the office of clerk of the peace is by law in the *Custos Rotulorum*, and not in the Crown.—*Harding v. Pollock*, 1 Dow & C. 453.

PEERAGE. *See* ATTAINER. EVIDENCE.
ROYAL MARRIAGE ACT.

1. The grant of honours is not regulated by the same law as the grant of lands, and therefore, where the Crown granted a peerage to a certain person *et hereditas suis masculis imperpetuum*, and the grantee died without issue, the title was held to descend to the male heir of a collateral branch of the family.—*The Earl of Devon's Case*, 2 Dow & C. 200.
2. Copies of wills are not evidence in the House of Lords to support a claim of peerage; the original must be produced.—*Netterville Peerage*, 2 Dow & C. 342.
3. Where three *Irish* peerages are considered extinct, and a new creation takes place, after which one of these peerages is revived, the new creation is valid under the Act of Union with *Ireland*, but the Crown's right again to create a new peerage will be suspended till the full number of vacancies has occurred.—*Bloomfield Peerage*, 2 Dow & C. 344.

See *The Fermoy Peerage Case*, 5 H. L. Cas. 716.
4. B. claiming, of right, to be Lord Baron of *Slane*, in the peerage of *Ireland*, as heir general of the last Lord *Slane*, and alleging that the same was a barony in fee, showed by his statement and proofs, that from the first creation of a peerage in his ancestors to the year 1597, four such peers, dying at various periods without issue male, but leaving daughters or sisters, were severally succeeded in the dignity by the heirs male, uncles or cousins, who were in possession of the family estates. The claimant farther showed that a Lord Baron of *Slane*, whom he alleged to be the last peer in the family, and of whom he stated himself to be sole heir general, left a daughter, an only child, who long survived him, but did not claim the peerage, and also two sisters, the elder of whom he stated to have died without issue, and from the younger the claimant derived his descent as her sole heir:

Held, that the claimant, though he

PEERAGE—continued.

- might be heir general, had failed to make out his claim to the dignity, as it appeared by his own statement to have gone uniformly to the heirs male in exclusion of the heirs female, who had never made claim to it.—*Slane Peerage*, 5 Cl. & F. 23.
5. Upon a claim to a *Scotch* peerage where no patent of creation can be found, but it appears from the records of the Parliament that the ancestor from whom the dignity is alleged to have descended sat in Parliament, an original instrument purporting to be under the Great Seal of *Scotland*, and produced from the repositories of the heir of entail of the family estates, will be received as evidence of the creation of such peer, with a limitation to him and his heirs male therein stated.—*The Huntley Peerage*, 5 Cl. & F. 349.

If a claimant omit to give evidence of the creation and limitation of one of several dignities to which he states in his petition that he is of right entitled, the Committee for Privileges will not report he has made good his claim to that dignity on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right.—*Id.*

In a claim of peerage, it is not sufficient, in the petition to the Crown, to state that the claimant is of right entitled to the dignity; but the petition should pray that the claimant may be declared so entitled, and the Committee for Privileges or the House has no power to supply the defect of the prayer, but it will be necessary for claimant to present an amended petition to the Crown.—*Id.*

6. On a claim by co-heirs to the dignity of a baron, created in the reign of *Henry VIII.*, and in abeyance from the reign of *Charles II.*, they proved that their ancestor sat among the peers in Parliament in the 25th of *Henry VIII.*; that he was duly summoned to and sat in the Parliament of the 28th of *Henry VIII.*; and that he and his heirs male, who were also his heirs general, were sum-

PEERAGE—continued.

moned to and sat in several succeeding Parliaments, by the style and title of Lord *Vaux*. To account for the want of evidence of a writ of summons prior to the sitting in the 25th of *Henry VIII.*, they showed that there were no Lord's Journals extant from the 7th to the 25th of *Henry VIII.*; that the enrolments of writs during that period were very imperfect; and that although the Patent Rolls were complete, no patent or charter of creation of a barony of *Vaux*, nor any record or trace of such patent was discovered, after the most diligent searches in all the offices for records:

Held, that the barony of *Vaux* was created by writ of summons and sitting in Parliament, and was therefore descendible to heirs general.—*The Vaux Peerage*, 5 Cl. & F. 526.

See the *Braye Case*, 6 Cl. & F. 757; *Donoughmore Case*, 3 H. L. Cas. 822.

7. A petitioner to the House of Lords, claiming, as an *Irish* peer, to be admitted to vote at the election of representative peers of *Ireland*, was required, in consequence of a doubt of his right, and also of an adverse claim, to give in a printed case containing his pedigree and references to his proofs.—*Earl of Roscommon's Claim*, 6 Cl. & F. 97.

The right to the same dignity having been the subject of investigation in the *Irish* House of Lords, the minutes of proceedings and of evidence, including depositions taken by commissioners under an order of that House were produced:

Held admissible here (the witnesses being dead), not only against the Crown and other parties to that investigation, but also against a person not a party to the proceedings, but who was cognisant of them.—*Id.*

It is the privilege as well as the duty of the Attorney General for *Ireland* to attend this House on the investigation of claims to *Irish* peerages; but he may, with the leave of the House, depute counsel to attend for him.—*Id.*

A claimant to a peerage having, in his petition to the House, stated a

PEERAGE—continued.

prima facie case, but being unable, on account of his circumstances to complete it, the Attorney General was ordered to bring forward his witnesses and conduct his case at the expense of the Crown. But the House makes such orders reluctantly, as they may embarrass the proceedings and encourage adventurers.—*Earl of Roscommon's Claim*, 6 Cl. & F. 97.

8. A dignity or title of honour cannot be taken away (where there is no deficiency or corruption of blood) except by express words in an Act of Parliament:

Held, therefore, that the *Irish* Act, 28 *Henry* 8, c. 3, vesting in the King in right of the Crown of *England*, all honours, manors, castles, signiories, jurisdictions, and all other possessions and hereditaments held by certain persons, or by any person to the use of any of them in *Ireland*, did not take away from any of them a personal dignity; and that the opinion of Lord *Coke* and other judges, that it took away the earldom of *Waterford* (12 Rep. 106), was erroneous in facts and in law.—*Earl of Waterford's Claim*, 6 Cl. & F. 133.

The House of Lords is now the only satisfactory tribunal to determine questions on claims to dignities, on reference from the Crown; accordingly a question of law having arisen on a petition of an *Irish* peer, presented to the House of Lords, claiming to be admitted to vote at the election of *Irish* representative peers, the House, with a view to a more solemn adjudication, recommended a petition claiming the peerage, to be presented to the Crown, in order that it might be referred by the Crown to the House, with the report of the law officers of the Crown annexed, and then the House by its Committee of Privileges, would adjudicate the right and report the same to the Crown.—*Id.*

An adjudication in that form by the *Irish* House of Lords is an authority as binding in the House of Lords of the United Kingdom, as a like determination by the latter House, or by the *English* or *British* House of Lords before the Union, in matters

PEERAGE—*continued.*

of *English* or *British* peerage. But the resolution of either House, affirming a report of its Committee, and recognising a right or privilege of peerage, is not equivalent to a determination upon a reference from the Crown, and is not conclusive against all objections.—*Earl of Waterford's Claim*, 6 Cl. & F. 133.

9. On the consideration of a claim to an ancient barony, which has been long in abeyance, if the claimant proves that his ancestor sat as a peer in Parliament, and no patent or charter of creation can be discovered, it is now the established rule to hold that the barony was created by writ of summons and sitting, although the original writ of summons is not produced.—*Braye Peerage*, 6 Cl. & F. 757.

A claimant to a barony as co-heir must not only give notice to the other co-heirs, but must also give *prima facie* proofs of the pedigree of such of them as decline to claim the barony, to enable the House to make a satisfactory report to the Crown.—*Id.*

The proper course for a co-heir of a peerage in abeyance, is to petition the Crown to terminate the abeyance in his favour; but if he does not claim the dignity, and it appears from the case of a claimant that he has an interest, the House will, on his petition, allow him to appear before the Committee of Privileges, and present a case to protect his interest.—*Id.*

One of several co-heirs to a barony in abeyance, which had been created by writ of summons and sitting in Parliament, was attainted of high treason. His son and heir was restored in blood only, by Act of Parliament, expressly excepting honours and hereditaments:

Held, that it is competent to the Crown to terminate the abeyance of the barony in favour of the heir of the person so attainted or of the heir of any of the other co-heirs, and that the right to terminate the abeyance in favour of any of the other co-heirs was not at all affected by the attainder.—*Bray and Camoys Peerages*, 6 Cl. & F. 757, 789.

PEERAGE—*continued.*

It is now established, that an attainder of one co-heir to a barony in abeyance does not affect the other co-heirs, who do not derive through the attainted person; and also that, if his heir is restored in blood, the Crown may terminate the abeyance in him or his descendants.—*Braye and Camoys Peerages*, 6 Cl. & F. 757, 789.

10. Circumstances in which the Committee for Privileges will receive in evidence the printed minutes and proceedings before a former Committee on the same peerage.—*Beaumont Peerage*, 6 Cl. & F. 868.

11. A claimant to a peerage in abeyance is bound to give notice to all the co-heirs known to him to be existing; and notice by letter through the post-office is not sufficient.—*Camoys Peerage*, 6 Cl. & F. 789.

12. It is now settled law that a sitting in Parliament in pursuance of a special writ of summons, constitutes in the absence of a patent, a dignity descendible to the heirs general of the body; and that in claims to ancient dignities, a summons and a sitting in Parliament are required to be proved.—*Hastings Peerage*, 8 Cl. & F. 144.

The usual evidence of a writ of summons is the enrolment; and, of a sitting, is the Parliament roll or journals of the time.—*Id.*

Where the writs of summons or enrolment, and the journals of remote times, are wanting, a memorandum entered on a Parliament roll of a grant to the King in his Parliament, by certain persons named "*et ceteri magnates et proceres tunc in Parlamento existentes*," is sufficient evidence that a person named therein sat as a lord of Parliament, although there was no proof that he was summoned to that particular Parliament.—*Id.*

Instruments purporting to be the acts of peers, but not acts done in Parliament, and not necessarily the acts of peers of Parliament, are not evidence that a person named in them ever sat in Parliament, although he was certainly summoned.—*Id.*

PEERAGE—continued.

In a claim to an ancient barony, it was proved that *Henry de H.* was summoned by special writ to Parliament, in the 49 *Hen. 3*; but there was no proof that he ever sat, there being no rolls or journals of that period. His son and heir, *John de H.*, sat in the Parliament of 18 *Edw. 1*; but there was no proof that he was summoned to that Parliament, there being no writs of summons or enrolments of them extant from 49 *Hen. 3* to 23 *Edw. 1*. To the Parliament of 23 *Edw. 1*, and to several subsequent Parliaments, he was summoned, but there was no proof that he sat in any of them:

Held, that it might be well presumed that *John de H.* sat in the Parliament of the 18 *Edw. 1*, in pursuance of a summons, on the principle that *omnia presumuntur legitime facta donec probetur in contrarium*. — *Hastings Peerage*, 8 Cl. & F. 144.

Length of time is no bar to a claim to a dignity; yet if a series of persons of right entitled to it do not enjoy it, or assert their right, a presumption may arise against the right on claim by their descendants, unless the absence of enjoyment or claim is satisfactorily accounted for.

Where 450 years elapsed from the death of the last possessor of a dignity, and during 250 years a question was pending whether the heirs male of the half blood, or the heirs female of the whole blood, were entitled to succeed, and before that question was determined the dignity fell into abeyance, and remained in that state for the residue of the time:

Held, that those were sufficient reasons to rebut the presumption arising from the long omission to enjoy or claim the dignity.—*Id.*

The doctrine that *possessio fratris*, though applicable to lands, does not affect the descent of a dignity by writ, was confirmed.—*Id.*

13. An agreement under seal between Lord *H.* and the plaintiff in error, recited that a company had been formed for making a railway; that the plaintiffs in error were shareholders; that a bill had been intro-

PEERAGE—continued.

duced into Parliament, according to which the line would pass through Lord *H.*'s estates and near his mansion, and that he opposed the passing of the bill; that plaintiffs in error had proposed that if he would withdraw his opposition and assent to the railway, they would endeavour to deviate from the proposed line; and Lord *H.* agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent; and the plaintiffs in error covenanted, that in case the said bill should be passed in the then Session, they would, in six months after it received the royal assent, pay Lord *H.* 5000 *l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to, further compensation in the event of the deviated line not being ultimately adopted.

Lord *H.*, in consequence of these stipulations, withdrew his opposition; the bill passed in that Session, and after six months had elapsed, his Lordship brought his action in debt for the 5000 *l.*, alleging in his declaration the facts above stated; to which the plaintiffs in error pleaded that the railway, at the time of the agreement and according to the Act, was intended to pass through lands of divers individuals, and the agreement was made secretly without their knowledge, and was concealed from them until the Act passed, and was concealed from the Legislature during the passing of the Act; and that Lord *H.* was a peer of Parliament:

Held (affirming the judgment of the Court of Exchequer Chamber), that the agreement was valid, inasmuch as Lord *H.*, though a peer, had a right to bargain in his individual character for compensation for injury to his property; and it was not shown on the record that the money was promised as a consideration for his vote being given or withheld; or that the parties to the agreement intended to conceal it from the individual landowners on

PEERAGE—*continued*.

the line or from the Legislature; or that any fraud was intended or committed on any party.—*Simpson v. Lord Howden*, 9 Cl. & F. 61.

See *Hawkes v. Eastern Counties Railway*, 5 H. L. Cas. 331; *Preston v. Liverpool and Manchester Railway*, 5 H. L. Cas. 605.

14. A statement in a claim of peerage made by the claimant's father, who at the moment of making it was himself a claimant, and an affidavit made in support of the claim, were admitted, as representations made by the claimant, and as coming through him before the Committee, to be read in answer to his claim.—*Tracy Peerage*, 10 Cl. & F. 167.

Any document laid by a claimant before the Attorney General, and with his report, referred to the House, becomes evidence.—*Id.* 173.

15. On a claim to an ancient peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franka, and of official correspondence; and who said that from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting:

Held, that the evidence was inadmissible.

Held, that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting, from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant, together with property formerly belonging to that ancestor, was a competent witness to prove

PEERAGE—*continued*.

the handwriting of the pedigree.—*The Fitzwaller Peerage*, 10 Cl. & F. 193.

16. The wife of a peer of the realm left him in 1808, a year after their marriage, and instituted a suit in the Ecclesiastical Court for nullity of the marriage *propter impotentiam*. Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in *Scotland*, and during many years' cohabitation with him had several children, who were named after him, and educated as his children; but in 1823 they and their mother assumed the name and titles of the peer. He generally lived abroad, had no access to his wife after she left him, but knew of her infidelity, and took no proceedings to dissolve their marriage, or to illegitimise the children. Upon the petition of his brother, heir presumptive to his titles, stating those facts, and alleging that the peer was likely to survive all the witnesses to them, and praying protection to the descent of the titles:

The House of Lords held, that the petitioner—although by law he might perpetuate evidence, regarding titles of Honour, in Chancery, was entitled to have a private Act of Parliament; and on proof, to the satisfaction of both Houses of Parliament, of the facts above stated, an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage.—*The Townshend Peerage*, 10 Cl. & F. 289.

17. An ancient barony in fee, after having been enjoyed by the lineal heirs of the first baron successively for centuries, then becoming dormant for some time, was claimed and again enjoyed by one who, after full investigation, was found to be the heir of the first and last barons. It afterwards fell into abeyance among his co-heirs.

Semble, that it is not necessary for one of these co-heirs claiming the barony to give proofs of the first creation,

PEERAGE—continued.

and of the divers meane descents of it.—*Fitzcarrall Peerage*, 10 Cl. & F. 946.

Semble, that on a claim to an ancient barony, minutes of proceedings on a former claim, before the King in Council, are admissible in evidence in the House of Lords.—*Id.*

A long abeyance of a dignity, if satisfactorily explained, is no objection to a claim.—*Id.*

18. It appeared by the Parliamentary pawns of 36 *Hen.* 8 and 1 *Edw.* 6, that a writ had been directed to "Thomas Lord Wharton," for each of these Parliaments, but there was no evidence of his sitting in either of them, or of the writ itself. The Journals of the House of Lords showed that he was summoned to, and sat in, the Parliament of the 2 *Edw.* 6, and subsequent Parliaments. Creation of baronies by patent was not then unusual, but no patent or record, or other trace of a patent, creating the barony of *Wharton*, could be found:

Held, that the said barony was created by writ and sitting in the 2 *Edw.* 6, and was descendible to heirs general (of the body).—*Wharton Peerage*, 12 H. L. Cas. 295.

A decretal order in Chancery reciting the substance of the bill and answer, is admissible, on proof of pedigree to identify parties. *Scotch* wills registered in the Court of Session, and retained there, are admissible. But on claims of peerage, the Committee will not receive copies of wills, unless it is proved that the originals cannot be produced.—*Id.*

If a judgment of outlawry stands in the way of a claim to a barony in abeyance, although it is clearly erroneous, the Committee for Privileges cannot overlook or reverse it, but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the Committee.—*Id.*

19. Where a patent of peerage cannot be found, entries on the Journals of the House of Lords, showing the

PEERAGE—continued.

limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received.—*The Barony of Saye and Sele*, 1 H. L. Cas. 507.

20. In a claim to an ancient *Scotch* dignity, if no patent or other instrument of creation can be produced, it may be presumed that the dignity was created by patent, or charter, limiting it in the manner in which it has been actually enjoyed. And if that enjoyment is shown to have been confined to heirs male, in exclusion of nearer heirs female, the dignity must be held to be a male honor, always descendible to the heirs male of the body of the first grantee.—*Crawford and Lindsey Peerage*, 2 H. L. Cas. 534.

Ancient documents of a public character are, in the absence of patents or Parliamentary records, admissible as evidence of the creation and existence of peerages.

Semble, that by the law of *Scotland* contemporaneous history is admissible for the same purpose.—*Id.* (but see 547, n).

An ancient patent, without the seal, but with the attestation thereof duly verified, is admissible in evidence.—*Id.*

An ancient *Scotch* dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger with the King's authority; or it might be resigned to the King, to be regranted by a new patent, with different distinctions, and with its old precedence.—*Id.*

A witness brought to prove a copy of an old document, should be able to read and understand the original when he compared the copy with it.—*Id.*

21. On a claim to a *Scotch* peerage, there being no patent or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission, under the Great Seal and King's sign manual, dated in February, 1605, directing the Com-

PEERAGE—continued.

missioners to create *James Lord Drummond, Earl of Perth*, was received, and held, in conjunction with subsequent entries in the Parliamentary records, to be sufficient proof of the creation of the earldom.—*The Perth Peerage*, 2 H. L. Cas. 865.

In the absence of the instrument of creation of a *Scotch* peerage, the limitations are taken to be to the grantee and his heirs male general.—*Id.*

On the death of a peer leaving his eldest son and heir, who had been attainted, the peerage does not vest in such son, nor, on his death in the nearest heir male, but is forfeited as much as if the son had been the peer at the time of the attainder.—*Id.*

A peerage limited to a man and his heirs male is one entire estate, and no substitution of heirs takes place.—*Id.*

A peerage limited to a man and his heirs male whomsoever, is forfeitable under the Act 26 Hen. 8, c. 13.—*Id.*

Attested copies of *French* registers of marriages, births, and deaths:

Held, to be admissible evidence, on the testimony of a *French* advocate, that such registers were kept according to *French* law, and would be receivable in evidence in the *French* Courts.—*Id.*

23. *Scotch* peerages created by patents, in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became in 1699 vested in the fifth baron and earl, who was attainted of high treason in 1715, and died in 1725 without leaving issue. His collateral heir, descended from a younger son of the first peer, claimed the dignities in 1848:

Held, that the attainder was a bar.—*Carnegie and Southesk Peerage*, 2 H. L. Cas. 908.

24. The Sovereign cannot hold a peerage. Where, therefore a member of the

PEERAGE—continued.

Royal family, who was a peer of *Ireland*, succeeded to the Crown, the peerage became extinct.—*The Oranmore Peerage*, 2 H. L. Cas. 910.

25. An *Irish* earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent creating the viscounty described the grantee by the name and title of the *Irish* earldom. On the death of the holder of these titles, his eldest son received a writ of summons to attend the House of Peers as an *English* viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of *Ireland* allowed, and it was allowed. After his death his son received a writ of summons as an *English* viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of *Ireland*, in virtue of the *Irish* earldom. The petition came before the Committee for Privileges. The patents creating the *Irish* earldom and the *English* viscounty, the writ of summons to the previous viscount, and the entry on the Journals showing that he had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved:

Held, that this was not sufficient to establish the claim of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it.—*The Earl of Drogheda's Claim*, 3 H. L. Cas. 822.

Such evidence not being producible at the moment, the claim was, adjourned.—*Id.*

26. *Quære*, whether a subject can refuse a peerage created either by patent or by writ?—*Egerton v. Brownlow (Earl)*, 4 H. L. Cas. 1-37.

27. The word "peerage" in the 5th clause of the fourth article in the Act of Union of *Great Britain and Ireland*, means the status and condition of a peer, and therefore where one per-

PEERAGE—continued.

son held many titles, by any one of which he could sit in the *Irish House of Peers*, so long as any one of those titles remained in him or his descendants, the loss of any of the others did not constitute an extinction of a peerage.—*Fermoy Peerage*, 5 H. L. Cas. 716.

A., before the union with *Ireland*, was a peer of *Ireland*, by the title of Earl M. That title had descended to him from an ancestor, to whom it was granted with the usual limitation to the heirs male of his body. Before the union took effect, A. received a new patent, creating him Baron of M., remainder to the heirs male of his body, failing whom to B., and the heirs male of his body. A. died without leaving male heirs of his body, and the Earldom of M. was left without a successor, and the Barony of M. passed to B.:

Held, that this was not such an extinction of a peerage as was contemplated by the Act of Union, and consequently could not be taken as one of three extinctions, on the happening of which the Crown could create a new *Irish peerage*.—*Id.*

Quare, whether when the validity of an existing grant of a peerage is questioned, the Attorney General is bound to appear to support it?—*Id.*

28. Letters patent were granted by the Crown to a commoner, purporting to create him a baron of the United Kingdom for life, with a seat in Parliament. The letters patent were followed by a writ of summons to Parliament in the usual form.—*Wensleydale Peerage*, 5 H. L. Cas. 958.

The House referred it to a Committee for Privileges to examine and consider the letters patent, and to report their opinion thereon to the House. This reference was made without any previous reference of the matter by the Crown to the House.—*Id.*

The Committee reported "that neither the said letters patent, nor the said letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein

PEERAGE—continued.

named, to sit and vote in Parliament."

The House affirmed the resolution.—*Wensleydale Peerage*, 5 H. L. Cas. 958.

The Committee declined to put a question to the judges on this matter, which did not involve the validity of the patent for all purposes, but only the right under it to sit and vote in this House.—*Id.*

29. A. claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct, would be entitled to the estate, but who alleged that their title would be defeated if the claim should be established, were allowed to appear and be heard in opposition to the claim.—*Shrewsbury Peerage*, 7 H. L. Cas. 1.

30. A claim of a barony by tenure was made by devisee (tenant for life) of the estate which was said to give the right to the peerage. A person who did not claim the estate was held to have no *locus standi* to be heard in opposition to the claim.—*The Berkeley Peerage*, 8 H. L. Cas. 21.

Assuming that, in fact, there existed in the reign of Hen. II., a barony of *Berkeley*, enjoyed by successive barons in respect of the possession of certain hereditaments, no legal claim to be summoned to, and sit in, Parliament for such a barony, can exist at the present day in any tenant for life or devisee of such hereditaments.—*Id.*

The 11th section of 12 Car. 2, c. 24, has not the effect of preserving such barony by tenure, if it ever existed.—*Id.*

The Committee for Privileges will, in its discretion, permit documents to be proved by printed minutes of proceedings before a former Committee on the same peerage, but, as a rule, will require the production of the original documents.—*Id.*

Semble, that when the nature of the peerage, and not the pedigree of the claimant, is in question, a plate erected in St. George's Chapel, *Windsor*, on the installation of a particu-

PEERAGE—*continued*.

lar person as Knight of the Garter, is not admissible in evidence to prove the description given of him.—*The Berkeley Peerage*, 8 H. L. Cas. 21.

A report of the proceedings on another and different claim of peerage, can only be referred to for the purposes of argument, but cannot be received as evidence.—*Id.*

PENALTY. *See* COVENANT, 1.PERPETUITY *See* WILL.PERPETUAL RENEWALS. *See* LEASES FOR LIVES. TENANTRY ACTS.

A lease made in 1663 of land in *Ireland*, together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them; to hold the premises, without impeachment of waste, to him, his executors, administrators, and assigns, for 99 years, at a rent therein mentioned,—contained a covenant that the lessor, his heirs and assigns, should, upon request of the lessee, his executors, administrators, and assigns, from time to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators, and assigns should reasonably require for strengthening, confirming, and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the said lease were contained. Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739 :

Held, by the Lords, affirming the judgment of the Court of Exchequer in *Ireland*, that the covenant was not for perpetual renewal, but for confirming and farther assuring the original lease. The House allowed a question of evidence to be argued, though not raised on the face of the petition of appeal.—*Brown v. Tighe*, 2 Cl. & F. 396.

See Sadlier v. Biggs, 4 H. L. Cas. 435.

PERSONAL ESTATE. *See* DOMICILE. INTERSTATES ESTATE. JURISDICTION. LEGACY.

1. A portion of an entailed *Scotch* estate was, in accordance with the power given by the 42 *Geo.* 3, c. 116, sold by the heir in possession for the purpose of redeeming the land tax on the whole estate. The surplus, after the redemption of the tax, was to be vested in trustees, who were to pay the heir of entail in possession interest on that surplus till it should be reinvested in the purchase of land. The next heir of entail sold his reversionary or contingent right to this interest to an *English* purchaser, by a deed executed in *England*, and in the *English* form :

Held, by the Lords, affirming a decree of the Court of Session, that the interest was moveable property, and was well assigned by an *English* deed.—*Scott v. Albutt*, 2 Dow & C. 404.

2. The law of a domicile of a deceased person governs the succession to his personal estate, wherever situated ; but the estate itself must be administered in the country in which possession is taken of it under lawful authority.—*Preston v. Mcville*, 8 Cl. & F. 1.

The Courts in *Scotland* have no power to appoint persons to administer property in *England*, that power being exclusively vested in the *English* Ecclesiastical Courts, and of that the *Scotch* Courts are bound to take notice.—*Id.*

The persons named as trustees and executors in the will of a domiciled *Scotchman* having declined to act, his next of kin obtained letters of administration of his personal estate in *England* from the proper Ecclesiastical Court there, and afterwards consented to the appointment, by the Court of Session in *Scotland*, of other persons as trustees and executors, in place of those named in the will, with all the powers that had been thereby given to them. These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her

PERSONAL ESTATE—continued.

under the administration, and offering her a full release from liability :

Held, by the Lords (reversing a decree of the Court of Session), that the personal estate in *England* must be administered there by the administratrix, by virtue of the letters of administration.—*Preston v. Melville*, 8 Cl. & F. 1.

See *Carron Company v. MacLaren*, 5 H. L. Cas. 416; *Enoch v. Wylie*, 10 H. L. Cas. 1; *Drummond v. Drummond*, L. R., 2 Ch. Ap., 32.

3. A suit was instituted in the Court of Chancery in *Ireland*, by the trustees of A.'s will, for carrying the trusts thereof into execution, and for administration of his estates; and B., one of the defendants thereto, and who was entitled to the residue of A.'s estate, having died before decree, bills of revivor, and supplement and amendment, were filed by the plaintiffs in the original suit against B.'s personal representatives, and against all the parties interested under his will in his real and personal estates; and a decree was made directing accounts to be taken of the personal estates, debts, and legacies of A. and of B. respectively. By a subsequent decree, affirmed by the House of Lords, certain unpaid legacies of B., and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of C., the tenant for life thereof under B.'s will, but the interest to be paid out of the rents and profits during C.'s life. On a question subsequently arising between C. and D. the tenant in tail of the real estates after C.'s life estate, whether a fund in Court, part of B.'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or rateably in payment of the legacies and of the interest, the Master of the Rolls and Lord Chancellor of *Ireland* made orders directing the fund to be applied exclusively in payment of the arrears of interest; and the Lord Chancellor

PERSONAL ESTATE—continued.

refused to direct an inquiry as to how much of the fund in Court was principal, and how much accumulated interest :

Held, on appeal against these orders, that any question as to the application of B.'s personal estate could not be regularly adjudicated in this form of suit, between the co-defendants C. and D., and the orders appealed from were affirmed, with a variation and declaration that they should be without prejudice to any question between C. and D. as to the manner in which the principal and interest of the legacies should be paid.—*Coote v. Trench*, 9 Cl. & F. 74.

4. *Semble*, that the rule in *Wild's case* (6 Rep. 17), that "if A. devises his lands to B., and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail," is applicable to personality.—*Stokes v. Heron*, 12 Cl. & F. 161.
5. Under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and to vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate so as to constitute a mixed fund.—*Boughton v. Boughton*, 1 H. L. Cas. 407.
6. A testator, after devising real estates to trustees to the use of J. D. P. for life, remainder to his first and other sons in tail male, and to several others, bequeathed real and personal chattels to the same trustees, to permit the said J. D. P. to receive the profits for his life; and from his decease to permit each of the several other persons, to whom an estate for life in the real estates was before limited, as each of them should become seised of the said real estates under the aforesaid limitations, to receive the rents thereof for his and their life and lives respectively; and from and after the decease of the last and said tenants for life as should become seised in manner aforesaid, or if none of them

PERSONAL ESTATE—continued.

should so become seised, then from the decease of the said *J. D. P.* upon trust to assign and convey the chattels to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid :

Held, that the chattels vested in an infant, grandson of *J. D. P.*, who was tenant in tail of the real estate on *J. D. P.*'s death, and not in his eldest son, a prior tenant in tail, who died in *J. D. P.*'s lifetime.—*Potts v. Potts*, 1 H. L. Cas. 671.

7. A contract to transfer property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property as well as to real estate.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

PETITION OF RIGHT. See 23 & 24 VICT. c. 34.

A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The Governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English Government received all the money agreed upon between the two Governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. *A.* presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. *A.* proceeded to make his claim afresh under a petition of right :

Held, that he had no remedy except

PETITION OF RIGHT—continued.

under the provisions of the statute.—*De Bode v. The Queen*, 3 H. L. Cas. 449.

PIN MONEY. See HUSBAND AND WIFE.

The Duchess of *Norfolk* was entitled, under the trusts of the settlements made in contemplation of her marriage with the duke in 1771, to two annuities of 700*l.* and 300*l.* charged by way of pin-money, upon estates to which the duke was entitled for his life. The duke received all the rents and profits of the estates, and maintained the duchess according to her rank, up to the time of his death in 1815. In 1816 the duchess was found to have been a lunatic without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the duke, arrears of the pin-money from 1782 to 1815 :

Held, by the Lords, reversing the decree of the Court below, that the personal representative of the duke was entitled to set off any payments made by the duke in respect of the pin-money, against a claim for the arrears by the duchess during her lifetime, and that the personal representative of the duchess was not entitled to any arrears of her pin-money.—*Howard v. Digby*, 2 Cl. & F. 634.

See *Payne v. Little*, 26 Beav. 5.

PLAN. See CONTRACT, 4.**PLEADING. See PRACTICE. TITHES. VESTRY.**

1. *Right of Way*.—In an action of declarator of immunity from a servitude, attempted to be exercised by the use of two roads, upon the lands of the pursuer, the defender set up a title by prescription to the use of the said roads. The pursuer obtained an order that the defender should state precisely what he claimed and what he offered to prove. The defender, after describing the course of the roads, "offered to prove by parol testimony that they had been un-

PLEADING—*continued.*

interruptedly used, the one leading to the harbour of *Aberdour* as a road for foot passengers, horses and carriages, and the other to *Whitesand's Bay*, as a road for foot passengers, by all the proprietors of grounds or houses situated on the east side of the rivulet called *Aberdour Burn*, and lying in the parish of *Aberdour*, and particularly by the defender and his predecessors (to whom the description applies) for a period beyond the memory of man":

Held, that the particular uses for which each way was claimed, must be stated, and also the particular person to whom, and the form (by grant or otherwise) in which the use attached. Also, that an allegation in the condescendence that the particular purposes and uses would appear when the proof was given, was not sufficient, as the pursuer had a right to know to what point the evidence was to go that he might be prepared to answer it.—*Morton (Earl) v. Stuart*, 1 Dow, 91.

2. *Bond*.—Covenant on an annuity bond against the surety in the bond. The declaration set forth the bond, from which it appeared that the annuity was payable on the 5th January, 5th April, 5th July, and 10th October, and that the defendant *Hearn* covenanted for due payment by the grantor, on the days mentioned, and that in default he, the defendant, would pay within 28 days after such default. The declaration then alleged for breach, that "on the 5th of July 1811, two quarterly payments of the said annuity had become due from *Hearn*" (instead of from the grantor). *Hearn* allowed judgment to go by default, and then brought error for this defective averment:

Held, that, as the bond and covenant were properly set forth in the declaration, the inconsistent allegation in the breach ought to be treated as surplusage.—*Hearn v. Cole*, 1 Dow, 459.

3. *Custom*.—*Quære*, whether an allegation that the pursuers, inhabitants of the town of *St. Andrews*, and all others who came to "the links of *St. Andrews*" for the purpose of playing

PLEADING—*continued.*

golf there, is, under the law of *Scotland*, a good allegation of a right to play that game though to the detriment of the profitable use of the property by the owner.—*Dempster v. Cleghorn*, 2 Dow, 40.

4. *Bond*.—In debt, on bond with a penalty for the performance of covenants, breaches under the statute 8 & 9 *Will. 3*, c. 11, s. 8, may be assigned in the replication.—*Johnes v. Johnes*, 3 Dow, 1.

And, on demurrer, interlocutory judgment may be given to the extent that it appears to the Court that the replication is sufficient, and that the plaintiff ought to recover his debt and damages for the detention; and final judgment may be stayed till after award and execution of the writ of inquiry.—*Id.*

5. *Bill of Exchange*.—Declaration on a bill of exchange. First count states that bill was accepted payable at the house of *B. & Co.*; averment, that the bill was presented for payment at the place where the same was made payable as aforesaid, and payment thereof was then and there demanded; no averment that payment was refused. There were the usual other counts, and the declaration concluded with the general averment that the defendant had not paid any of the sums of money in the declaration mentioned:

Held, sufficient.—*Benson v. White*, 4 Dow, 334.

See *Butterworth v. Le Despencer*, 3 *Man. & S.* 150; *Bush v. Kinnear*, 6 *Man. & S.* 210.

6. *Borough Election*.—In order to sustain a proceeding for penalties under the Statute 16 *Geo. 2*, c. 11 (*Sc.*), for not having duly taken the votes at a borough election, there must be a distinct averment that the complainant was duly elected, the statute having given the penalties to the person so elected.—*Black v. Campbell*, 5 Dow, 23.

7. *Precept of Sasine*.—A precept of sasine is not to be founded upon unless it corresponds with the charter.—*Dixon v. Graham*, 5 Dow, 266.

PLEADING—continued.

8. *Triennial Prescription*.—A solicitor in London was employed to conduct an appeal to this House against a decree of the Court of Session in Scotland. He instituted a suit in the Court of Session against the person who, he supposed, had employed him, and who resided in Scotland, to recover the costs incurred. The defendant pleaded the triennial prescription according to the law of Scotland:

Held, that the plea was sustainable.—*Campbell v. Stein*, 6 Dow, 116.

See *The British Linen Company v. Drummond*, 10 Barn. & Cress. 903; *Don v. Lippman*, 5 Cl. & F. 1.

9. *Corporation—Charitable Uses*.—Information by the Attorney General, at the relation of of a freeman of Limerick, against the chamberlain and mayor, sheriffs and citizens, or common council of that city, stating that certain lands and revenues were granted to and vested in the corporation at large for divers public uses and purposes, the improvement of the city, and the preservation and support of public buildings, bridges, highways, and establishments therein; that the defendants had usurped the powers of the whole corporate body, and that the chamberlain, in concert with the common council, had, contrary to the charters and immemorial usage, applied the revenues to their private purposes, without reference to the citizens and freemen at large, in their general assembly or Court of D'Oyer Hundred, &c., and praying that the chamberlain might account, and that a receiver might be appointed. Demurrers, for want of equity and jurisdiction, overruled by Master of the Rolls; and the order affirmed by the Lord Chancellor, who was of opinion that the uses were charitable, and that the fact was sufficiently alleged. This order was affirmed in *Dom. Proc.*—*Gort (Viscount) v. The Attorney General*, 6 Dow, 136.

See *Attorney General v. Mayor of Carlisle*, 2 Sim. 446.

10. *Description of Place*.—Action on a penal statute, one-half of the penalty to the informer, the other half to the

PLEADING—continued.

poor of the parish; after verdict for the plaintiff, it was alleged for error, that although there are two parishes of St. James, in the county of Middlesex, that of Clerkenwell and that of Westminster, the record had not distinguished which of them, but only designated "the parish of St. James, in the county of Middlesex:"

Held, well enough (at least after verdict), as the right parish might recover its moiety of the penalty, by shewing that it was the parish in which the offence had been committed.—*Taylor v. Willan*, 1 Dow & C. 19.

11. *Question for Jury*.—Declaration, that in consideration of plaintiff's appointing P. C. his agent, defendant undertook that P. C. would faithfully and honestly discharge any duty assigned to or trust reposed in him. Plea: no undertaking in writing. Replication: an undertaking in writing. Demurrer to the replication, for that this was bringing matter of law to be tried by a jury. But the replication held good, as putting in issue a matter of fact to be tried by a jury.—*Lysaght v. Walker*, 2 Dow & C. 211.
12. *Question for Jury—Virtute cuius*.—In an action of trespass, where the defendants justify under a *fi. fa.*, and the plaintiff replies *de injuriâ abque residuo cause*, and new assigns, that the defendants committed the trespasses on other occasions, and for other purposes than in the plea mentioned, the judge may leave it to the jury to say whether the execution was *bonâ fide* or colourable. If a *virtute cuius* raises a mere inference of law, it is not traversable; if a question of fact, it is.—*Lucas v. Nockells*, 1 Cl. & F. 438.

See *Williams v. Smith*, 4 H. & N. 562; *Hooper v. Lane*, 6 H. L. Cas. 443; *How v. Kerchner*, 11 Moo. P. C. 21.

13. *Defective Plea*.—To a bill filed by persons claiming title to an estate as co-heirs of A. T. *ex parte materna*, and charging an agreement and a correspondence in which they alleged that their title was admitted, the de-

PLEADING—continued.

fendants pleaded to the whole bill, that there was in existence an heir of *A. T. ex parte paterna* :

Held, that the plea was properly overruled by the Courts below, on the ground that it ought to be accompanied by an answer as to the correspondence and some of the charges in the bill.—*Harland v. Emerson*, 2 Cl. & F. 10.

14. *Defective Answer—False Issue.*—By indenture, made in 1827, between *R. P.* and his eldest son, *D. P.*, reciting that *R. P. P.*, of *C.*, was seised of large real estates, was never married, and was then in a state of mental and bodily imbecility ; that in the event of his dying so seised, intestate, and without issue, *R. P.*, as his heir-at-law, would be entitled to the reversion of his estates in fee ; that *R. P.* was desirous of having a commission of lunacy sued out for the protection of *R. P. P.* and his property, and also of his own reversion, and that *D. P.*, at *R. P.*'s request, agreed to sue out and prosecute such commission, and take other necessary law proceedings, at his own expense, in *R. P.*'s name ; *R. P.*, in consideration of the agreements, and of love and affection for *D. P.*, covenanted to convey all the estates that would descend to him on the decease of *R. P. P.* to the use of himself for life, remainder to the uses expressed respecting the estate of *R.* in *D. P.*'s marriage settlement, being for the benefit of *D. P.* and the heirs male of the marriage. The commission was accordingly issued ; *R. P. P.* was declared a lunatic, and *D. P.* was reimbursed for his expenses out of his estate. *R. P.* was then 63 years of age ; the lunatic was 40 ; *D. P.* was younger. The lunatic died in 1829, and *R. P.* entered into possession of his real estates, and conveyed them to his second son, *R. H. P.*, for valuable consideration. On a bill filed by *D. P.* to set aside that conveyance, and for specific performance of the covenant, *R. P.*, by his answer, said he entered into it without legal advice, and by fraud, imposition, and misrepresentation on the part of *D. P.* It was proved in evidence that both

PLEADING—continued.

parties employed the solicitor who prepared the indenture under advice of counsel for each ; that *R. P.* read it, and heard it read, before he executed it, and afterwards, as well as before, expressed his desire that the estate of *C.* should be united to the estate of *R.*, and go to the eldest son :

Held, by the Lords (reversing a decree which dismissed the bill), that *R. P.* tendered a false defence, and that all the matters put in issue by his answer were disproved by the evidence.—*Persse v. Persse*, 7 Cl. & F. 279.

15. *Delay in objecting to form of Judgment.*

—Held (affirming the judgment of the Court of Session), that a defender whose name is omitted *per incuriam* from the conclusions of the summons, is not to be permitted to have recourse to that omission as a fatal objection to the whole process after his defences, preliminary and on the merits, have been repelled. The defect was cured by the acts and acquiescence of the defender and of his representative sited in his place.—*Creighton v. Rankin*, 7 Cl. & F. 325.

16. *Allegations and Prayer.*—A tenant of lands in Ireland, under the seventh renewal of a lease made in 1672, not in existence, but admitted to contain an agreement as to the amount of fine to be paid "upon the renewing or inserting of any life or lives," filed a bill for renewal against the lessor's assigns, and referring to the recitals of that agreement, in former renewals, as evidence of the covenant contained in the original lease, prayed that that covenant be decreed to be a covenant for perpetual renewal :

Held, that the case so made, and the issues tendered by the bill, were confined to the construction of the agreement as to the amount of the fine contained in the lease of 1672, and identified by the reference to the recitals of it in the renewals ; and did not warrant either of two issues directed by the Court below, to try

1. Whether at or before the making of the lease of 1672 (which

PLEADING—*continued.*

was previous to the Statute of Frauds in *Ireland*), there was an agreement between the parties for a lease of lives renewable for ever.

2. Whether that lease contained any agreement or covenant for renewal, independent of the agreement as to the amount of the fine to be paid on inserting any life or lives.

The latter issue would be consistent with the bill, if it had prayed relief on the ground that the original lease being lost, the dealings between the parties for 120 years justified an inference that it contained a covenant for perpetual renewal. But the draftsman was precluded by former proceedings from so framing it. — *Smyth v. Nangle*, 7 Cl. & F. 405.

17. *Insufficiency of Pleadings.*—The plea of a defendant (a surety in a bond given to the Commissioners of Assessed Taxes) averred that the collector had lands and goods, of which the Commissioners had notice, and that they did not seize and sell. The replication was, that the collector had no property subject to seizure and sale, of which the Commissioners had notice; the rejoinder was, that the collector had lands and goods which might have been seized and sold, but were not, *modo et forma* as alleged by the plaintiffs; concluding to the country. The rejoinder did not say anything of notice. The verdict was, that the collector had lands and goods which might have been seized and sold, but that the Commissioners had no notice of the collector's lands, but had reasonable grounds for believing that he had goods:

Held, that there could be no judgment for the defendant on these pleadings, nor any judgment for the plaintiffs *non obstante veredicto*, but only a *venire de novo*. — *Gwynne v. Burnell*, 7 Cl. & F. 572.

18. *Several Defendants.*—It is difficult to lay down rules as to multifariousness applicable to all cases; but if a case is an entire case as against one

PLEADING—*continued.*

defendant, an objection for multifariousness cannot be made by another defendant who is connected only with some portion of the whole case. — *Parr v. The Attorney General*, 8 Cl. & F. 409.

19. *Separation—Consideration.*—A deed of separation between a husband and wife having been drawn up, but not executed by the husband:

Held, that his executing such deed was, and might be averred to be, a legal consideration for an agreement by a third person to pay a sum of money to the husband towards payment of certain debts and expenses for which the husband was solely liable. — *Jones v. Waite*, 9 Cl. & F. 101.

See *Wilson v. Wilson*, 1 H. L. Cas. 538; 5 H. L. Cas. 40.

20. *Duty—Damages.*—If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable jointly and severally, for the failure and refusal. — *Ferguson v. Kinnoull (Earl)*, 9 Cl. & F. 251.

Where persons having ministerial functions to perform, have by their neglect to perform such functions, rendered themselves liable to an action for damages, no allegation of malice is necessary to sustain the action. — *Id.*

21. *Affray.*—A plea justifying an arrest for an affray, without warrant, ought to contain a direct averment that there was an affray, or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal. — *Price v. Seeley*, 10 Cl. & F. 28.

A plea of justification to an action of trespass for assault and false imprisonment, stated that defendants were in lawful possession of a yard, and were there erecting a wall, by their servants; that plaintiff entered the yard and upon the wall, and made a great noise, disturbance, and affray, ill-treated defendants, threw down their servants

PLEADING—*continued.*

so employed, and obstructed the erection of the wall, in breach of the peace; then averred a requisition by defendants to plaintiff to depart, and his refusal and continuance; whereupon defendants and their servants gently removed him, and he violently resisted, and assaulted one of defendants in so doing; and it proceeded thus, that plaintiff then and immediately afterwards, and just before the said time when &c., with force, &c., again broke and entered the yard, and got upon the wall, and again made a great noise, disturbance, and affray therein, and threatened to assault, insulted and ill-treated and showed fight to defendants, and then again forcibly obstructed the farther erection of the said wall, and threw down part thereof, &c., in breach of the peace; whereupon defendants, having view of the offences and misconduct of plaintiff last aforesaid, in order to prevent such breach of the peace, &c., then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of plaintiff, to take him before a justice; and the policeman took him before a justice:

Held, that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well-founded apprehension that it would be renewed.—*Price v. Seeley*, 10 Cl. & F. 28.

22. *Quære*, whether a bill filed to make an infant a ward of Court, ought not to allege some right or claim of the infant to property within the jurisdiction, although untrue?—*Johnstone, v. Beattie*, 10 Cl. & F. 42.

23. *Statute of Limitations—Revivor.*—To a writ of *scire facias*, issued in 1837, by the executors of the conusee of a judgment, recovered in 1810 against the heirs and terre-tenants of the conusee, one of the terre-tenants pleaded the 40th section of the statute 3 & 4 *Will.* 4, c. 27, to which the executors replied a judgment of revivor, recovered by themselves

PLEADING—*continued.*

within 20 years before the issuing of the *scire facias* :

Held, by the Lords (agreeing with the unanimous opinion of the judges of *England*, and reversing a judgment of the Court of Exchequer Chamber in *Ireland*)—

1. That the plea was a sufficient answer to the claim stated in the writ.

2. That the replication was a departure from the writ, and therefore bad on general demurrer.

3. That a new right accrued to the executors by the judgment of revivor recovered by themselves.—*Farran v. Berresford*, 10 Cl. & F. 319.

Semble, that if the executors had issued the *scire facias* on the judgment revived by them within the 20 years, the statute would not have barred the claim.—*Id.*

Semble, that the Irish statute 8 *Geo.* 1, c. 4, s. 2, is repealed, so far as judgments are concerned, by the statute 3 & 4 *Will.* 4, c. 27.—*Id.*

24. *Contract or Tort.*—Wherever there is a contract and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.—*Brown v. Boorman*, 11 Cl. & F. 1.

In case, the declaration alleged that *A.* employed *B.* as a broker to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to *B.*; that *B.* accepted the employment, and sold oil to *C.* on the terms of payment on delivery; that it thereupon became the duty of *B.* not to deliver the oil without payment; that *B.* delivered the oil to *C.* but did not obtain payment, whereby the plaintiff was damaged:

Held, that the declaration set forth a good cause of action; that the duty of *B.* arose out of the contract, and that, after verdict, judgment could not be arrested.—*Id.*

PLEADING—continued.

25. *Carriers*.—In a declaration against carriers, one of the counts averred the contract to be to carry goods from *D.* to *L.*, and to take care of them on landing at a wharf there, and to deliver them to the plaintiff; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire, without defendants' default:

Held, a good plea to the count.—*Bourne v. Gatiliff*, 11 Cl. & F. 45.

26. *Form of Judgment*.—A general judgment for the Crown, on an indictment containing several counts, one of which is bad, and where the same punishment is not fixed by law for all, cannot be supported.—*O'Connell v. The Queen*, 11 Cl. & F. 155.

A good finding on a bad count, and a bad finding on a good count, stand on the same footing; both being nullities.—*Id.*

An indictment against different defendants consisted of several counts, charging them with various illegal acts; some of the counts were bad, and on some of the good counts there were bad findings. The judgment against each of the defendants was stated to be in respect of "his offences aforesaid":

Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge.—*Id.*

Where, therefore, a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding is bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one.—*Id.*

Held, that each count must be considered as charging a separate offence, and that the expression "his offences aforesaid," must be treated as extending to all the offences of which each defendant had been found guilty; and as some of the counts

PLEADING—continued.

and some of the findings were bad, such judgment could not be supported.—*O'Connell v. The Queen*, 11 Cl. & F. 155.

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law, and repugnant, inasmuch as the finding that the three were guilty, was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy; whereas, by the same finding, it appears that the other five were guilty of conspiracy to effect only some of those objects.—*Id.*

A count charging defendants with conspiring "to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm," is bad; first, because "intimidation" is not a technical word having a necessary meaning in a bad sense; secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate.—*Id.*

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. Where, therefore, defendants in an indictment in the Court of Queen's Bench in *Dublin*, pleaded in abatement, that the indictment was found on the evidence of witnesses who had not been sworn in open court, according to the Act 56 Geo. 3. c. 87 (*Ir.*), but did not set out in the plea the names of those witnesses, nor allege that there were no other witnesses, duly sworn, on whose evidence the indictment was found, nor allege that the witnesses on whose evidence it was found, were not affirmed, the plea was held bad.—*Id.*

PLEADING—continued.

And for the same reasons, a plea in abatement, on the ground that the swearing of the witnesses had not been duly certified by the signature of the foreman or other member of the grand jury, under the 1 & 2 Vict. c. 37, was held bad.—*O'Connell v. The Queen*, 11 Cl. & F. 155.

See *Irwin v. Grey*, L. R., 2 H. L., 22.

27. *Impertinence*.—An information filed by the Attorney General at the relation of A. and B., praying for the Crown the benefit of a judgment in outlawry against C., and that a deed executed by C., conveying his property to trustees might be set aside as fraudulent and void as against the Crown, contained short statements showing the interest of the relators, and alleging that the motives for the deed were to defraud C.'s creditors:

Held, that these statements were not impertinent. Exceptions for impertinence cannot be sustained, unless it appears clearly that the statements excepted to cannot be material at the hearing of the case.—*Richards v. The Attorney General*, 12 Cl. & F. 30.

Although it is not necessary that a relator in an information should have an interest in the subject of the suit, yet a statement showing his interest is not impertinent, as in the event of the suit failing, the costs may be more easily apportioned.—*Id.*

28. *Attorney—Negligence*.—A declaration or a summons against an attorney or a law agent, to recover damages for loss occasioned by his mismanagement of a cause, must charge gross ignorance or gross negligence, or must at least contain allegations of fact from which the inference is inevitable, that the defendant has been guilty of one or the other. The law as to both these matters is the same in *England* and in *Scotland*.—*Purves v. Landell*, 12 Cl. & F. 91.

29. *Surety*.—If a surety intends to rely upon any fact for his defence as

PLEADING—continued.

showing that there was a previous agreement between the banker and the customer to deal with the credit obtained by the customer through the surety in a particular manner, to which if he had known it he should not have consented to become surety, he must bring such a defence before the Court by putting it on the record.—*Hamilton v. Watson*, 12 Cl. & F. 109.

30. *Foreign Judgment*.—Judgment was given by competent tribunals in *France* against A. in an action brought by him against persons with whom he had been connected in a loan transaction, for the purpose of obtaining from them an account, and payment of his share of the profits in the loan. He thereupon filed a bill in the Court of Chancery against some of the same persons, and for the same purposes, charging that the said judgment was contrary to justice, and was not final; and also that subsequently to the date of the said judgment, farther profits accrued to the defendants from the said loan, and claiming a right to a share in them:

Held, that a plea of the foreign proceedings and judgment, setting them forth in substance and effect, filed by the defendants to the bill, supported by averments that the matters in issue in the foreign tribunals were the same as the matters put in issue by the bill, covered the whole of the matters comprised in the bill, and was a sufficient answer thereto. In pleading a foreign judgment, it is not necessary to set forth the proceedings and judgment at length.—*Ricardo v. Garcias*, 12 Cl. & F. 368.

See *Enohin v. Wylie*, 10 H. L. Cas. 1; *Dogliani v. Crispin*, L. R., 1 H. L., 307.

31. *Assignees—Bankrupt*.—A declaration in trespass stating a breaking and entering, damaging the doors, hinges, and locks, spoiling the grass and fruit trees, and exposing the plaintiff's goods to sale on his premises; by means of which &c., the plaintiff was not only disturbed in the possession of his house, but prevented

PLEADING—continued.

from carrying on his business, and deprived of the enjoyment of his goods, the defendant pleaded that, before the action was brought, the plaintiff became a bankrupt:

On general demurrer, it was held (affirming the judgment of the Court below) that, as there were some causes of action included in the declaration which would not pass to the assignees, the plea, which embraced the whole and did not select any particular portion of the declaration, was insufficient and bad.—*Rogers v. Spence*, 12 Cl. & F. 700.

See *Beckham v. Drake*, 2 H. L. Cas. 579.

32. *Bill of Review*.—To sustain a bill of review, proceeding on facts discovered subsequent to the decree complained of, it must be shown that leave of the Court to file it was regularly obtained.—*Tommey v. White*, 1 H. L. Cas. 160.

To sustain a bill of review for error apparent on the decree complained of, it is not enough to allege that the decree is erroneous, but error must be shown on the face of it.—*Id.*

33. *Information*.—The Attorney General, after the passing of the statute 5 Vict. c. 5 (1841), filed an information against the Mayor and Commonalty of London, in which it was alleged that the Crown was seised of the bed and soil of the River Thames; that the defendants were conservators, thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) license to embank parts of the river, and had received fines for such licenses, and that the said embankments were nuisances; and the information then prayed that the rights of the parties might be ascertained, that the licenses might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity:

Held (affirming a decree of the Master of the Rolls), that upon these plead-

PLEADING—continued.

ings the information was maintainable.—*The Mayor of London v. The Attorney General*, 1 H. L. Cas. 440.

If a bill or information discloses, upon the facts stated, in any part of it, ground for a decree in equity, it is maintainable. (*Per Lord Cottenham, Lord Chancellor*).—*Id.*

A bill which raises a legal question may be so framed as not to be open to demurrer on that account, but on the real nature of the question appearing at the hearing, the Court of equity will refuse to interfere. *Id.*

34. *Fraud*.—Where a purchaser seeks to be relieved against a purchase, on the ground of personal fraud by the vendor, but states no other ground for relief, and the alleged fraud is not proved, he is not entitled to relief on any other ground.—*Wilde v. Gibson*, 1 H. L. Cas. 605.

35. *Innuendo—Libel*.—Though defamatory matter may appear to apply to a class of individuals, yet, if the descriptions in such matter are capable of being, by innuendo, shewn to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.—*Le Fanu v. Malcomson*, 1 H. L. Cas. 637.

Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel, imputing that "in some of the Irish factories (meaning thereby the plaintiff's factory)" cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff; the declaration was held good.—*Id.*

36. *Averment of Condition*.—If on an application for the renewal of a patent, the Judicial Committee should impose a condition on the party applying for the patent, such party need not afterwards, in an action for an infringement of the patent, aver that such condition was complied with before the patent was renewed.—*Ledsam v. Russell*, 1 H. L. Cas. 687.

PLEADING—continued.

37. *Feigned Issue*.—A writ of error alleged error in the judgment in "an action on promises." The transcript of the record showed that the judgment was given, not in an action on promises, but on a feigned issue:

Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.—*King v. Simmonds*, 1 H. L. Cas. 754.

38. *Joinder of Parties*.—Parties having adverse or inconsistent rights in the subject matter of a suit, cannot be joined as co-plaintiffs.—*Fulham v. McCarthy*, 1 H. L. Cas. 703.

Nor can a party who has no interest be joined with one who has.—*Id.*

Therefore, where one of the next of kin of an intestate, after assigning her distributive share of the estate, is joined as co-plaintiff with the assignees, in a bill against the administrator and the other next of kin, for an account and payment, there is a misjoinder of plaintiffs, of which the defendant may take advantage at any stage of the cause, and such misjoinder will, even on the hearing, be sufficient to occasion a dismissal of the bill.—*Id.*

In a suit in which the assignor and an assignee of an equitable interest appear as plaintiffs, an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-plaintiffs, and not between them and the defendants.—*Id.*

39. *Insufficiency of Parties*.—Where a bill was filed by an heir at law to impeach conveyances of real and personal estate, on grounds of fraud and undue influence, and want of consideration, but there were no parties to the bill to represent the personal estate comprised in the impeached conveyance, the absence of such parties to the bill was held to be a fatal defect.—*Farmer v. Farmer*, 1 H. L. Cas. 724.

40. *Allegation of Authority*.—An allegation in a record that three judges executed a commission in relation to the trial of prisoners, to try whom that commission was issued, is an

PLEADING—continued.

affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others.—*O'Brien v. The Queen*, 2 H. L. Cas. 465.

41. *Insurance, Total and Partial Loss*.—Under a declaration for a total loss of freight, a partial loss of freight may be recovered.—*Benson v. Chapman*, 2 H. L. Cas. 697.

42. *Peremptory or Dilatory Plea*.—A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. 4, c. 120, s. 5, and a decree thereon may be the subject of appeal to this House.—*Geils v. Geils*, 3 H. L. Cas. 280.

A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *à mensâ et thoro*. Judgment was given in her favour. The husband returned to Scotland, where the wife instituted a suit for divorce *à vinculo*. The husband pleaded the proceedings in the Court of Arches as a bar to further proceedings in Scotland:

Held, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House.—*Id.*

43. *Libel—Innuendo*.—In an action for libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew anything about

PLEADING—*continued.*

the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects):

Held, that the *innuendo* did not enlarge the sense of these words, which were fully capable of bearing the meaning given to them.—*Barrett v. Long*, 3 H. L. Cas. 395.

The third count repeated the same words, and accompanied them with the following *innuendo* " (meaning thereby, that the house of business of the said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character, that he would not be visited, in the way of his trade and business, except from some political, or party, or other improper motive) ":

Held, that the words were capable of the meaning thus attributed to them; but that if the *innuendo* was more extensive than the words, it might be rejected as repugnant and void, and that the words being libelous, were actionable without its aid.—*Id.*

44. *Fraud—Improvvidence.*—A bill charged fraud, and sought to set aside a conveyance on the ground of fraud; the charge of fraud was not made out. The facts might have been sufficient to impeach the conveyance as improvidently made, but no charge of that kind, nor prayer founded on it, was introduced into the bill:

Held, that the bill was properly discussed.—*Curson v. Belworthy*, 3 H. L. Cas. 742.

45. *Consideration for Employment.*—A count in a declaration in *assumpsit* set forth an agreement between an attorney and solicitor and a com-

PLEADING—*continued.*

pany, that "from January then next, the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the company as such attorney and solicitor; and should for such salary advise and act for the company on all occasions in all matters connected with the company" (the prosecuting and defending of suits, preparing bonds, and some other matters, for which he was to be allowed the regular charges, being excepted), "and that he should attend the secretary and the board of directors when required." The count then alleged, "that in consideration that the plaintiff had, at the request of the company, promised the company to perform his part of the agreement, the company promised the plaintiff to perform their part, and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid." The count then alleged for breach, that "though for a small space of time the company did retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the salary, and though he was always ready and willing to advise and act for the company, and to accept the salary on the terms aforesaid, and in all other respects to fulfil the agreement on his part, yet the company disregarding, &c., did not, nor would, continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but, on the contrary," in May, "wrongfully dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, and to pay him the salary as aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of the salary, and also of divers great gains and profits which he might and otherwise would have derived from such employment in and about the prosecuting and defending of suits and preparing of

PLEADING—*continued*.

bonds, &c." After a verdict for the plaintiff, with 200 l. damages :

Held, that the count did sufficiently allege a consideration for the promise to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the company to perform the agreement.—*Emmens v. Elderton*, 4 H. L. Cas. 624.

46. *Lunatic—Revivor*.—Is an answer by committees binding on the estate of the lunatic?—*Stanton v. Perceval*, 5 H. L. Cas. 257.

Is it binding on them in any other character?—*Id*.

Quære, is a replication necessary to an answer to a mere bill of revivor?—*Id*.

47. *Supplemental Bill*.—Circumstances under which a supplemental bill is properly filed.—*Persse v. Persse*, 5 H. L. Cas. 682.

Circumstances under which, with relation to an original settlement, a second wife and the children of both marriages may properly be made parties to such bill.—*Id*.

48. *Error*.—A judgment of the Court of Common Pleas in *Ireland* had overruled a bill of exceptions. On error to the Exchequer Chamber there, the judgment of that Court was, that some of the exceptions be allowed and some disallowed, and that the judgment be reversed, annulled, and held for nought. A *venire de novo* was awarded. On error brought to this House, after the 16 & 17 *Vict.* c. 113 (*Ir.*):

Held, that the defendants in error might join in error in the usual form, without thereby admitting that any of the exceptions had been properly overruled, the judgment of the Exchequer Chamber being restricted to reversing, &c. that of the Common Pleas, and awarding a *venire de novo*.—*M' Mahon v. Lennard*, 5 H. L. Cas. 931.

49. *Bank Acts*.—A petition of certain persons under the 33 *Geo.* 2, c. 14 (*Ir.*), on behalf of themselves and all the creditors of an *Irish* bank, for administration of assets, under

PLEADING—*continued*.

the trusts of that statute, is informal. It ought to be, in any case where it can be maintained, a petition on behalf of all the creditors of the persons constituting the bank, the provisions of that statute affording a remedy not exclusively for debts owed by those persons in respect of the bank, but for their debts generally.—*O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142.

50. *Misjoinder*.—A declaration for disturbance in an office contained three counts. The first and third were in case; the second, after reciting the title of the plaintiff to the office, alleged that the defendants broke and entered his dwelling-house, and seized and took the beams and scales, &c., and otherwise hindered him from exercising his said office :

Held, that this was not a misjoinder.—*M' Mahon v. Lennard*, 6 H. L. Cas. 970.

51. *Allegations to impeach Securities*.—In a bill to set aside securities, the petitioner alleged that when he executed the securities, he "was led by the defendant to believe, and did in fact believe, that the defendant had become possessed of the bills for the amount of which such securities were given to him," in a certain manner, which was not the true manner; and, "under the circumstances aforesaid, the execution of the sureties was obtained by fraud and misrepresentation or concealment of the real facts:"

Held, that whatever objections might have been raised on demurrer to the sufficiency of this mode of allegation, it was too late after evidence and hearing to raise any.—*Smith v. Kay*, 7 H. L. Cas. 750.

Quære (by Lord Cranworth), whether under the authority of *Williams v. Lord Jersey* (Craig & Phil. 91), such an allegation would not have been sufficient even on demurrer.—*Id*.

52. *Non-payment of Premium on a Policy*.—*S.* effected an insurance on the life of *B.* The policy was headed, "Annual premium, 33 l., whole term, payable by quarterly instalments of 8 l. 5 s. each." It was dated 2nd

PLEADING—continued.

August, 1856, and recited that the assured had "paid 8*l.* 5*s.* as the premium until 2nd November." It then witnessed, that if *B.* shall die within 12 calendar months from the date hereof, or shall die beyond such period, and the assured shall, on or before that period, or before the expiration of any succeeding 12 calendar months, pay the amount of the premium, &c., the insurers should be liable: "Provided that if *B.* shall die before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premiums for that year, reckoning it to commence from the 2nd of August." *B.* died after the third quarterly instalment had become payable, but before it was paid. In an action on the policy, the defendant pleaded that the non-payment of this third instalment rendered the policy void:

Held, that the plea was an answer to the action.—*Phoenix Life Assurance Company v. Sheridan*, 8 H. L. Cas. 745.

53. *Lands Clauses Act*.—An action was brought against a railway company for not making a communication between small portions of intersected lands as required by the 93rd section of the *Lands Clauses Consolidation Act*. The company pleaded and claimed the benefit of the 94th section, and in the course of the plea averred that the lands were not situate in a town. This averment was found against the company:

Held, that it was an immaterial averment, and that notwithstanding this finding, the company was entitled to the benefit of the 94th section.—*Eastern Counties Railway, &c. v. Marriage*, 9 H. L. Cas. 32.

54. *Continuing Guarantie*.—Where a bill states a mortgage to the defendant, then a mortgage to the plaintiff (with notice to each party), and claims for the second mortgage priority over any sums advanced by the first mortgagee after he had notice of the second mortgage, if the first mortgagee means to set up a distinct understanding between all

PLEADING—continued.

the parties to the first mortgage (of whom the plaintiff was one), that the first mortgage should be a continuing guarantie for any sums advanced to the mortgagor at any time, such defence must be distinctly averred and proved.—*Hopkinson v. Rolt*, 9 H. L. Cas. 514.

55. *Contract to carry*.—A declaration or plaint alleged that *A.*, at the request of *B.*, a common carrier on a railway, became a passenger by the said railway, and paid his fare in that behalf; that *C.* was a servant of *B.*, and as such servant required *A.* to deliver to him, *C.*, a case which *A.* was then carrying with him, in order that the same might be carried in a certain compartment of the train. That *A.* delivered to *C.* the said case to be safely carried, and to be re-delivered at the end of the journey, and then averred the duty of *B.*, as a common carrier, and *A.*'s own performance of all the conditions precedent to the discharge of that duty by *B.*, and that the case was not re-delivered, whereby, &c. The defendant pleaded that *A.* had notice of the rule on the said railway, that passengers and their personal luggage were carried at one rate, and merchandise carried at another rate of payment; and that payment was required for all merchandise carried on the railway; that the plaintiff took the case with him as personal luggage, and did not pay for the same as merchandise, and that the case contained merchandise, of which defendant had not notice. The plaintiff replied that the case was, in appearance and fact, fit and proper for the conveyance of merchandise and not luggage, and did contain merchandise; that there was no improper concealment on his part, and that the defendant received the same as personal luggage, and without making objection thereto, and without demanding extra remuneration:

Held, that, even supposing that the declaration showed a good cause of action by reason of a contract between *A.* and *B.* through *C.* the servant, still the plea was an answer to it, and that the effect of the plea

PLEADING—*continued*.

was not got rid of by the replication, which was clearly bad, for not averring, in any way, that the defendants had notice or knowledge that the case contained merchandise.—*Belfast, &c. Railway Companies v. Keys*, 9 H. L. Cas. 556.

56. *Husband and Wife—Defamation*.—Where a wife (her husband being joined for conformity as a plaintiff) brought an action to recover damages from A. for slander uttered by him to her husband, imputing to her that she had almost been seduced by B. before her marriage, and that her husband ought not to let B. visit at his house, and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband:

Held, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special damage did not show (in the conduct of the husband) a natural and reasonable consequence of the slander.—*Lynch v. Knight*, 9 H. L. Cas. 577.

(*Allsop v. Allsop*, 5 Hurl. & Nor. 534, confirmed.)—*Id.*

Per Lord Campbell (Lord Chancellor): Though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable.—*Id.*

The loss by the wife of her maintenance by the husband, occasioned by a slander uttered by a third person, may be made the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred.—*Id.*

(*Vicars v. Wilcocks*, 8 East 1, observed upon.)—*Id.*

In such a case, though the act of the husband in sending away his wife was wrongful, because the slander was false, the fact that it was false cannot be taken advantage of by the slanderer as an objection to the husband appearing on the record as a plaintiff.—*Id.*

PLEADING—*continued*.

57. *Fraud*.—Where a suit is instituted in equity to set aside an executed contract, on the ground of the defendant having stated what is false, or concealed what ought to be disclosed, the circumstances shown must establish that his conduct amounts, in equity, to fraud.—*New Brunswick, &c. Company v. Conybeare*, 9 H. L. Cas. 711.

The bill must show not merely of what the alleged fraud consists, but how it has been effected.—*Id.*

Remarks on the form of alleging the facts in a bill of this nature.—*Id.*

58. *Corporation Insolvency*.—Where insolvency is an objection, under the terms of a corporation bye-law, to admittance to a corporation office, and the admittance is sought to be enforced by *mandamus*, the return ought to state an insolvency, within the true meaning of the bye-law.—*R. v. The Saddlers' Company*, 10 H. L. Cas. 404.

POOR.

1. In a parish comprising a borough and a district of land, the management and maintenance of the poor in the landward district cannot be separate from the management and maintenance of the poor in the borough; but the poor of both must be regarded as the poor of one parish, and indiscriminately entitled to aid from the parish funds.

Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. Where a Statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute.—*Magistrates of Dunbar v. Duchess of Roxburgh*, 3 Cl. & F. 335.

2. The Crown not being named in the 43 *Eliz. c. 2*, is not bound by its enactments. Property, therefore, in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the

POOR—continued.

poor.—*Mersey Docks v. Cameron; Jones v. Mersey Docks*, 11 H. L. Cas. 443.

The statute is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works.—*Id.*

Trustees who were constituted by Acts of Parliament, "The *Mersey Docks Board*," and were specially appointed to have the control of certain docks, &c., vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of *Liverpool*, were therefore held liable to be rated as occupiers, though they occupied such docks, &c., only for the purposes of these Acts, and derived no benefit from the occupation.—*Id.*

(*The King v. The Commissioners of the Saller's Load Sluice*, 4 T. R. 730; and *The King v. Liverpool*, 7 B. & C. 61, overruled).—*Id.*

Recent Acts expressly declared that certain warehouses and parts of the docks, then erected and for the first time put under the control of the trustees, were to be liable to rates.—*Id.*

Per Lord Chelmsford: These acts did not by implication declare that the other parts of the docks were not liable to rates.—*Id.*

PORTIONS. See MARRIAGE SETTLEMENT. SETTLEMENT, 3. 5. 9. 10. 13. 15. 16.

"PORTIONIBUS."

This word is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish, and will not of itself be taken to have any other meaning. — *Scarlet v. The Governors of Lutton Free School*, 4 Cl. & F. 1.

"PORT."

A Railway Act empowered the proprietors of the railway to levy a toll upon "all coals shipped on board any vessel, &c. in the port of *Stockton-upon-Tees* aforesaid":

Held, that these words meant the whole port of that name, and were not restricted to the port of the town of *Stockton-upon-Tees*; that there was not such an ambiguity in the enacting part of the Act as to compel a reference to the preamble of it; and that the word "aforesaid" did not limit the expression to the port of the town as described in that preamble.—*Stockton and Darlington Railway Company v. Barrett*, 11 Cl. & F. 590.

POST, LETTERS SENT BY.

A person putting into the post a letter, declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post-office.—*Dunlop v. Higgins*, 1 H. L. Cas. 381.

POST OBITS. See BOND.

POWER. See ALIENATION. ENTAIL. WILL.

1. Entail (in 1648) of an estate, consisting of about 60,000 acres, with prohibition against alienation, disposition, contracting debt, or doing anything in hurt of the tailzie and succession, in whole or in part, but with a power expressly reserved to the heirs of entail "to grant feus, tacks, and rentals, of such parts and portions of the said estate as they should think fitting, provided the same were made without hurt or diminution of the rental of the lands, and others aforesaid, as the same

POWER—continued.

should happen to pay at the time the said heir should succeed thereto." Grant by one of the heirs of entail of 16 feus of parts and portions of the estate, comprehending the whole of the estate, except the principal mansion house and 47 acres adjoining. Relative contract that the feued lands and others should be entailed on a new series of heirs, designated by the grantor, and that he should have the entire use and enjoyment of the estate during his life, in the same manner as if he had continued proprietor. These feus were all dated on the same day, and made in favour of the same person, and the casualties taxed:

Held, by the Court of Session, that these feus were not granted in conformity with the reserved power in the deed of 1648; that they were not real feus or dispositions *inter vivos*, but *mortis causa* settlements, for the purpose of altering the order of succession appointed by that entail; that each of them was liable to one or other of several special objections, and that the whole were so bound together that they could not be separated, but must be reduced *in toto*. This judgment was affirmed by the Lords, on the general grounds,—

1. That the feuing power, like that of leasing, was to be exercised, not *ad libitum*, but in a course of rational administration (without limiting that expression strictly to the sense in which it was to be understood when speaking of the duty of an ordinary administrator or manager), and that the 16 feus being, in reality, but one feu of the whole estate, were not granted in the due exercise of a power of rational administration, and on that ground could not be supported.

2. That the real object and effect of the transaction was, not to grant feus, properly so called, but, under the colour of granting feus, to alter the order of succession established by the entail of 1648, which, under that colour, the law would not permit to be done.—*Ker v. Roxburgh (Duke)*, 2 Dow, 149.

2. Entail, with prohibition against alienation, properly fortified with

POWER—continued.

irritant and resolute clauses, followed by a permissive clause to let life rent tack without diminution of the rental. No specific prohibition against letting of leases except as above. A lease granted by heir of entail for 97 years, taking a *grassum* or fine:

Held, that this lease fell under the prohibition against alienation.—*Montgomery v. Wemyss (Earl)*, 2 Dow, 90.

3. By a marriage settlement, dated in 1779, a tenant for life was empowered to raise a sum of money for his own behalf. No form for executing this power was prescribed, but there was a prohibition to sell or mortgage the lands. He granted (without referring in terms to the power) an annuity on part only of the settled estates, until a certain sum which he owed should be paid off:

Held, that this, though an informal, was, under the particular circumstances here existing, a valid, execution of the power.—*Marnell v. Blake*, 4 Dow, 248.

See *Dennett v. Pass*, 1 Bing. N. C. 388; Sug. Prop. H. L. 484.

4. *Quære*, whether a 57 years' lease is struck at by a prohibition to alienate in an entail, and whether the taking of a *grassum* (fine) comes within a proviso against diminution of the rental? — *Montgomery v. Wemyss (Earl)*, 5 Dow, 293.

"There is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others as he has for himself; if he has got more for himself than for others, that is decisive evidence against him." Per Lord Eldon (Lord Chancellor).—*Id.* 344.

5. *G.* was tenant for life of certain premises, and had a power to lease them for life at the best rent. *K.* was, in 1802, the tenant under a lease for those lives, which had been made in 1769, at 300 *l.* a year rent. *G.* was in 1802 still under age, and was pressed for money. *K.*, by the offer of im-

POWER—continued.

mediate payment of a year's rent then due (but by the custom of the country not payable till a year afterwards), and by the promise to plant 10,000 trees for the benefit of the landlord, and to make over to him those already planted, obtained a new lease of the land at the old rent, substituting, instead of the old lives (one of which had failed, though that fact was concealed from *G.*), two young lives. The lease thus obtained contained nothing about the trees planted, or to be planted, but there was endorsed on it an agreement to plant the 10,000 trees. *K.* retained the whole lease. He continued in possession, but planted no trees. He married about that time, and assigned the new lease upon trust to secure a provision for his wife. He soon after made a will, containing a provision for her in case of an eviction under the lease. *G.*, after coming of age, accepted rent from *K.* *K.* died. Bill against his widow, her trustees, and the son, brought by *G.*, to have the new lease delivered up to be cancelled, as being fraudulent and void; the bill was dismissed in the Court below:

Held, that this decision was erroneous; that the lease between the lessor and lessee was such as ought to be cancelled; but the cause was remitted to the Court below, to proceed with respect to the widow and her trustees as might be just.—*Knatchbull v. Kissane*, 5 Dow, 389

See *Harkett v. Macnamara*, L.L. & Goo. temp. Plunkett, 283; *Keating v. Keating*, L.L. & Goo. temp. Sugden, 133; *Harrison v. Guest*, 8 H. L. Cas. 481.

6. Tenant in fee of one undivided moiety, being tenant for life of the other undivided moiety with power of appointment in fee, devises as follows: "I hereby give and devise all my freehold estates in the City of London and county of Surrey, or elsewhere, to my nephew, *John Roake*, for his life, on condition that out of the rents thereof he do, from time to time, keep such estates in proper and tenantable repair."

Held, by the House of Lords, in concurrence with the unanimous opinion

POWER—continued.

of the judges, that this is not an execution of the power.—*Roake v. Denn*, 1 Dow & C. 437.

See *Slingsby v. Grainger*, 7 H. L. Cas. 277.

7. A testator, by his will, devised his lands to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life, without impeachment of waste, was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect, recited that the trustees had sold the lands for a certain sum, and that the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase money of the estate was paid to the trustees, and invested according to the directions in the will; the value of the timber was paid to the tenant for life:

Held, that this was a bad execution of the power, and that it was not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him.—*Cockerell v. Cholmeley*, 1 Ol. & F. 60.

See *Buckley v. Howell*, 29 Beav. 551; *Blackett v. Bradley*, 1 B. & S. 949.

8. By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund and died:

Held, that the power in the settlement was well exercised by the wife, and that the child's appointment by her will carried the fund to her appointees

POWER—continued.

after the death of the wife.—*Bray v. Bree*, 2 Cl. & F. 453.

See *Jebb v. Tugwell*, 7 De G., M., & G. 666; *Morse v. Martin*, 34 Beav. 501.

9. A person was by his marriage settlement tenant for life of an estate in *Ireland*, held on lease for lives renewable for ever, with power of appointment to one or more of the children of the marriage; the estate, in default of appointment, to go to the first and other sons successively in tail male; he, by deed poll, dated the 14th of January, 1804, appointed to his eldest son an estate in tail male; and by indenture of lease executed four days after, the father and son in consideration of 1600 l., to be applied in paying debts on the estate and renewable fines then due, demised part of it for lives. By a deed dated December, 1807, the son, in consideration of debts paid for him by the father, and in discharge of the trust and confidence reposed in him, conveyed the estate and all his interest therein, to the father and his heirs. The father, by his will, made after the death of his eldest son without issue, devised the estate, charged thereby with certain legacies, to the use of his two surviving sons and their respective issue, in equal portions, as tenants in common:

Held, by the Lords (reversing a decree which established the will), that the execution of the lease for 1600 l. so soon after the deed of appointment, and the circumstances appearing in those deeds, and in the deed of reconveyance of 1807, raised such suspicions of the validity of the appointment as required the Court, before it could adjudicate on the father's title to dispose of the estate, to direct an inquiry whether that appointment was a *bonâ fide* execution of the power.—*Jackson v. Jackson*, 7 Cl. & F. 977.

10. On the marriage of *T. P.*, a settlement was made of certain lands held on lease for lives renewable for ever. The settlement gave *T. P.* an estate for life, and contained the following power of leasing:—

POWER—continued.

"It shall be lawful for *T. P.*, and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. *T. P.* granted a lease to *A. P.*, at a farm rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heirs and assigns, would on the payment of 5 l. as a fine upon each life that should happen to die, add to the time and term of the lease the life of another person, nominated by the lessee, from time to time successively for ever:

Held, that this lease was not warranted by the power; and a decree by the Court of Chancery in *Ireland* directing specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed with costs.—*Clark v. Smith*, 9 Cl. & F. 126.

11. Lands were limited to such uses, &c. as *L. H. W.* should appoint by her last will and testament, in writing, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses. *L. H. W.* signed and sealed an instrument (before statute 1 Vict. c. 26) containing an appointment, commencing thus: "I, *L. H. W.*, do publish and declare this to be my last will and testament;" and ending thus: "I declare this only to be my last will and testament; in witness whereof I have to this, my last will and testament, set my hand and seal, the 12th day of September, &c." The attestation was thus: Witness, *C. B.*, *E. B.*, *A. B.*

Held, by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the judges), that the attestation was sufficient, and that the power of ap-

POWER—continued.

pointment was well executed. — *Burdett v. Spilsbury*, 10 Cl. & F. 340. See *post*, No. 20.

12. A will devising real estate, gave a power to the devisees for life to demise and lease the same for any term not exceeding 21 years in possession, "so as upon every such lease there should be reserved and made payable during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money, by way of fine or income, for or in respect of such lease." The first devisee for life, in exercise of this power, made a lease for 21 years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half yearly payments, on the 6th of April and 11th of October in every year, *except the last half year's rent, which was thereby reserved and agreed to be paid on the 1st of August next, before the determination of the lease.*

Held, by the Lords (concurring in the opinions of a majority of the judges, and reversing the judgment of the Exchequer Chamber), that the lease was a valid execution of the power. — *Rutland v. Wythe*, 10 Cl. & F. 419.

13. Husband and wife, by a post-nuptial settlement, conveyed part of the wife's estate to a trustee, to the use of her husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease, "for any time or term of years, or lives, and with or without covenants for renewals; and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he should think fit." The husband was also empowered to raise, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l.*, or to charge the premises therewith for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of parts of the estates comprised in the settlements, for terms of 999 years,

POWER—continued

upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee punishable for waste, and permitting him to cut timber, and to graff and burn the surface, and in this lease was included part of the wife's estate, not comprised in the settlement. The latter lease, and another of prior date, were made subject to existing freehold leases. None of the leases was referred to in the power. The fines received on the making of these and other leases amounted to 10,208*l.*, and the husband subsequently raised 10,500*l.* by mortgage of the estate, subject to the leases:

Held, that all the leases were valid at law, as being authorised by the power in the settlement, and consequently there was no ground of equity to impeach them. Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms, according to their ordinary acceptation. — *Sheehy v. Lord Muskerry*, 1 H. L. Cas. 576.

14. *R. P.*, being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment, to herself (in events that happened), over one-third part thereof by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein; and in default of issue of the marriage, *R. P.* becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. *R. P.*, by her will, devised, bequeathed, and appointed "all that one-third part of her real and personal estates over which she had a disposing power," upon trust immediately after her death, to raise a sum of 500*l.*, and "as to the residue of the said one-third part, and the remaining two-third parts" she gave the same to

POWER—continued.

her husband for life, remainder to her infant son and his heirs; but in case he should die under 21, without issue, she directed the residue of the said one-third part to be sold for payment of an annuity and legacies given by her will; the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under 21 without issue:

Held, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one-ninth of *R. P.*'s original third share, and to one-third of her moiety of the other third share.

2. That the annuity and legacies became payable on the death of the son, with interest on the legacies from that time.

3. That the will did not affect the husband's rights under the settlements, and no case of election was raised against him.—*Seward v. M'Donnell*, 2 H. L. Cas. 88.

15. Whether a power to convert personalty into realty, given to executors, operates as an absolute conversion.—*De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.
16. Where there is a deed, a power of revocation to be exercised by *A.* and *B.*, and *A.* dies without exercising it, the power is at an end.—*Montefiore v. Brown*, 7 H. L. Cas. 241.
17. A power was reserved to a married woman, notwithstanding coverture, by deed executed by herself, "and attested by three or more credible witnesses," to appoint:
Quere, whether, if she had been lawfully domiciled abroad, any execution of the power valid by the law of the country of her domicile, but not in compliance with the express terms of the power, would have been sufficient?—*Dolphin v. Robins*, 7 H. L. Cas. 390.
18. If there is an original power of appointment, and then an execution of

POWER—continued.

that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected. And if in the first instrument executing the original power, there is reserved a power of revocation and of new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but upon the revocation of such instrument, exists in full force.—*Saunders v. Evans*, 8 H. L. Cas. 721.

If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power, on such revocation, being in full force, there may be a valid execution of it by will, as well as by deed.—*Id.*

In 1794, an estate in land was made the subject of a settlement, under which two persons then about to be married were to have life interests, remainder to the use of such person for such estate, &c., as *A.*, the intended wife, by any deed, with or without power of revocation, attested by two or more witnesses, or by will attested by three witnesses, should from time to time, and as often as she should think fit, appoint. In 1830, *A.* by deed exercised this power, and the deed contained a power to revoke by deed, and to make a new appointment. In 1833, a deed revoking that of 1830, and newly appointing, and also reserving power to revoke and newly appoint, was executed. This was repeated in 1835 as to the deed of 1833. In 1836, *A.* executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, she declared the uses of the estate:

Held, that the deed of 1830 had not exhausted the power of 1794, and substituted a new power for it, to be executed only by deed; and that consequently on the revocation in 1836 of the last preceding deed, the

POWER—continued.

power of 1794 was capable of being exercised by A. either by deed or will.—*Saunders v. Evans*, 8 H. L. Cas. 721.

19. What is done under a power of appointment is to be referred to the deed creating the power.—*Braybrooke v. Attorney General*, 9 H. L. Cas. 150.

20. No memorandum of attestation to a deed made in execution of a power, stating the observance of all the particulars required by the deed creating a power, is needed to establish that the power has been, as to the forms required, duly executed.—*Newton v. Ricketts*, 9 H. L. Cas. 262.

(The case of *Burdett v. Spilsbury*, 10 Cl. & F. 340, confirmed.)

For such a purpose, there is no distinction between the execution of a will under the Statute of Frauds and of a deed under a power.—*Id.*

A power authorised a deed to be made by two persons, "under their hands and seals, in the presence of, and attested by, two witnesses." The attestation of the deed executing the power was "signed, sealed, and delivered in the presence of" two witnesses:

Held, that this was a sufficient attestation.—*Id.*

21. A power to be validly executed must be executed without any indirect object. The donee of the power must give the property, which is the subject of it, as property, to the person to whom he affects to give it.—*Portland (Duke) v. Topham*, 11 H. L. Cas. 32.

A. created a power to appoint a fund between two of his daughters, H. and M., or to appoint it to one, in exclusion of the other, and subject to such restrictions, &c., as the donee of the power (A.'s son) might think fit. The donee of the power executed a deed of appointment, which in form gave the whole of the fund to one of the sisters, H., but it was understood between the parties that H. was only to receive one moiety of the fund for her own use, and that she was to allow the other to accumulate, subject to some future

POWER—continued.

arrangement; and in pursuance of this understanding, H. gave her brokers directions to invest, in the name of the donee of the power, of another brother, and of herself, one-half of the fund and the interest thereon to accumulate: ;

Held, that this was, in equity, a fraudulent execution of the power, and that the deed of appointment was wholly void.—*Portland (Duke) v. Topham*, 11 H. L. Cas. 32.

The power authorised the donee to execute an appointment with or without a power of revocation and new appointment. The deed of appointment did not reserve the right of revocation. The Lords, while affirming the decree of the Court below, which declared the deed of appointment void, introduced into the order the words "without prejudice to any question as to any future exercise of the power of appointment," but refused to express any opinion whether any such future exercise of the power could be permitted.—*Id.*

22. A testator, after making specific devises of his property, real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c., not hereinbefore specifically bequeathed, I give, &c. to my executors, their heirs, &c., upon the trusts following," to pay debts and legacies, to permit his nephew, H. B. C., to receive the rents for life, and "after the death of my said nephew, provided he shall leave any child or children him surviving, &c., I direct that my executors, &c., shall stand seized of my said residuary estate, upon trust for such persons, and for such ends and purposes, as my said nephew shall by his last will direct, appoint, or devise; but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not previous to his decease make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c., upon trust for B., Y., and R., their heirs &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and

POWER—continued.

declaring himself thereby entitled to appoint, he appointed the residue to *E. and J.*:

Held, affirming the decision of the Master of the Rolls, that the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid; and the residuary estate went, under the uncle's will, to *B., Y., and R.*—*Earle v. Barker*, 11 H.L. Cas. 280.

PRACTICE. See ASSAULT, 1. BILL OF EXCEPTIONS. ENROLMENT. PATENT. RENT, 1. RES JUDICATA. SPECIFIC PERFORMANCE, 1. 3. TITHES, 2.

1. *Form of Judgment.*—Where one of the defenders in a proceeding for assault was a justice of the peace, the Court of Session having decreed damages against all conjointly, remitted as to that one, the case to his Majesty's Advocate General, to consider how far it was proper that this defender should continue in office:

Held, that such event was not properly a part of the judicial decision.—*Macdonnell v. Macdonald*, 2 Dow, 66.

2. The Court of Session had made a decree which the Lords thought assailable on points of form alone:

Held, that it must be affirmed.—*Henderson v. Malcolm*, 2 Dow, 285.

3. *Delay.*—After bill, answer, and replication, no farther steps were taken in a cause for upwards of 20 years. This delay was held not to be a reason for refusing specific performance of an agreement which the House held to be valid; but held to be a good reason for not giving costs where otherwise they would have been given.—*Cane v. Lord Allen*, 2 Dow, 289.

4. *Partial Remit.*—There were, in a cause brought up from the Court of Session, several important points involved, which the Court below had not had under consideration; it was remitted for review generally,

PRACTICE—continued.

with a declaration as to one particular point which had specially been the subject of appeal.—*Andrew v. Murdoch*, 2 Dow, 401.

5. *Judgment.*—On demurrer (in an action of debt on bond), interlocutory judgment may be given to the extent that it appears to the Court that the replication is sufficient, and that the plaintiff ought to recover the debt and damages for detention, and that final judgment may be stayed till after the award and execution of a writ of inquiry.—*Johnes v. Johnes*, 3 Dow, 1.

Where the interlocutory judgment was in Easter Term, but, as the inquiry could not, according to the usual mode of holding the assizes, be taken, nor the truth of the breaches be inquired into, pursuant to the statute, till after Trinity Term, the day given to the parties was in Michaelmas Term, passing over Trinity Term altogether, without continuance:

Held, that as in the due execution of the object of the statute, the giving a day in Trinity Term would have been nugatory, the reason for the continuance failed, and the omission was no error.—*Id.*

6. *Bills of Exchange.*—In a case where each of two parties had accepted a bill for the full price of goods furnished to the firm, and being sued upon both bills had instituted a process of multiplepoinding, the Court below found the partners liable only on one and single payment. This judgment was not appealed against. But in a subsequent judgment in the same case one of the bills is preferred.

Per Lord *Eldon* (Lord Chancellor): If both bills are equally good, as the judgment that the acceptors are only liable in one and single payment, is not appealed from, and is therefore final, upon what principle is it to be determined that one bill should be paid and the other not?—*Davidson v. Robertson*, 3 Dow, 218.

7. *Costs.*—A decree of a Court below was reversed, but there having been considerable delay in presenting the appeal, the respondents were relieved

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from costs subsequent to the decree.
—*Hamilton v. Grant*, 3 Dow, 33.

See *Douglas v. Scougall*, 4 Dow, 269. *Ante*, INSURANCE, 13.

[*Mem.*—It is now never the practice to give costs on a reversal.]

8. *Remit*.—Though the Lords do not adopt the reasons for the decision in the Court below, the case will not be remitted if their Lordships are satisfied that the decision itself is right.
—*Young v. Leven*, 4 Dow, 138.

9. *Bond—Fraud—Mortgage—Appeal*.—*A.* and *B.* claim, under separate wills, as devisees of *C.*, and upon suit at the instance of *A.*, the will in favour of *B.* is set aside, and that in favour of *A.* established. *B.* then sets up a bond of the devisor for 40,000 *l.*, being more than the value of the whole property; on which bond he brings an action at law and obtains judgment, whereupon *A.* amends his bill, and prays and obtains an injunction to restrain execution.

A., after the will in his favour has been established, and before action on the bond, gives to *D.*, his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by *D.* to *A.*, *D.* does not make himself a party, but suffers the suit to proceed in the name of *A.* as the sole plaintiff.—*Daly v. Kelly*, 4 Dow, 417.

Decree in 1800 for payment of the sum in the bond, with interest from the time of the devisor's death, instead of from its date, so that the bond was partly relieved against; and *per Lord Redesdale* afterwards in *Dom. Proc.*, the bill must be understood as having submitted to have the relief made effectual according to the rights of the parties. *A.* then compromises the suit, and refuses to appeal; and the whole property sold and purchased in trust for *B.*, for a less sum than that reported due to him.—*Id.*

D. files his bill against *A.*, *B.*, and another person, charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from

PRACTICE—continued.

it in the name of *A.*, if that should appear to be for his advantage. Decided that the mortgage was valid as between *D.* and *A.*, and that *D.* had a right to appeal in *A.*'s name: appeal accordingly by *D.* in *A.*'s name, in the cause *A. v. B.*; and appeal against the decree authorising that appeal.—*Daly v. Kelly*, 4 Dow, 417.

The House of Lords, without deciding whether *D.* had a right to appeal in this way, refer back *D.*'s cause to the Court below for re-hearing, that the Court might decide whether *D.* might not impeach the decree in the cause of *A. v. B.*, to the extent of his claims, by bill in the nature of a bill of review or otherwise, though the same remained in force against *A.*—*Id.*

See *Landon v. Morris*, 5 Sim. 247. 259.

10. *Delay—Judgment*.—Bill in 1805 for performance of an agreement made in 1761, for sale of lands, and decreed accordingly below; but reversed in *Dom. Proc.*, defendant having been left in possession as owner for so long a time, and plaintiff having done acts inconsistent with the notion of being himself owner, which was considered as amounting to a waiver.—*Rosse (Earl) v. Sterling*, 4 Dow, 442.

Objection to a decree made in 1812, that it ordered payment of a sum found due, and directed to be paid with interest, by a decree made in 1766, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest, and the objection comes too late; though, if objections had been recently made for the purpose of opening the accounts, they could hardly have failed of being effectual.—*Id.*

11. *Judgment by Default—Writ of Inquiry*.—In an action on a colonial judgment, the debt was stated in lawful money of Great Britain. The

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declaration set forth a judgment in Jamaica for so much Jamaica currency, with an averment that this amounted to so much in lawful money of Great Britain. The defendant suffered judgment by default, but brought error in the Exchequer Chamber, where, without argument, the judgment was affirmed :

Held, on error in this House, that by suffering judgment by default, the defendant had himself assessed the amount, and rendered a writ of inquiry needless.—*Doran v. O'Reilly*, 5 Dow, 133.

12. *Hearing Counsel*.—A defective record on a bill of exceptions was sent up to the House. The House, instead of refusing to hear the case, permitted the counsel for both parties to select such parts as they meant to rely upon ; and on such selections the case was heard ; but an entry was ordered to be made on the Journals to guard against the mischief of such a precedent. — *Kildare (Bishop) v. Smyth*, 5 Dow, 225.

13. *Preliminary Objections*. — Appeal from a judgment in declarator in 1810, suffered to drop, and action of reduction brought in 1812 to reduce the judgment in the declarator ; and in 1813 one appeal presented from the judgments in both causes, and the general answer put in. Objected, when the appeal came to be heard in 1817, that it was irregular to join both causes in one appeal ; and besides, that the appeal was irregular as to the declarator, the petition not having been presented within the first 14 days of the Session. The House was of opinion that there was an irregularity in the mode of bringing the causes before it ; but 1. The objection ought to have been made in 1813, when the other parties might have put themselves right in point of form ; 2. It ought to have been made by petition, to be referred to the appeal committee ; 3. When a cause comes to be heard, it is to be taken as regular ; and therefore the appeal was heard on the merits, and leave given to the parties afterwards to set themselves right in point of form, by presenting another petition

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of appeal in the declarator, *nunc pro tunc*, as if it had been done in 1813. — *Dixon v. Graham*, 5 Dow, 266.

14. *Discharge of Jury*.—Error assigned, for that it appeared by the record that, on certain issues, the jurors had given no verdict at all, and that it did not appear on the record that both parties had given their consent to such discharge :

Held, by the Lords, affirming the judgments of the Courts of King's Bench and Exchequer Chamber, that this was not error, as the judges may, of their own authority, discharge the jury.—*Powell v. Sonett*, 1 Dow & C. 56.

15. *Omission of Point of Appeal*.—Judge's direction objected to in the House on the ground of ambiguity. But as this point was not brought under the notice of the judge, nor made matter of exception at the time of the direction given :

Held, that it could not afterwards be relied on.—*Ball v. Mannin*, 1 Dow & C. 380.

16. *Parties*.—*T. G.* institutes a suit, and pending the proceedings dies, leaving two wills, of which the second is established ; but before the second is discovered, the suit is revived by the parties entitled under the first, and *R. F. G.* entitled under the second, that the suit should proceed in the names of the parties entitled under the first will, and that the benefit should accrue to whichever should be found ultimately entitled. Decree for the plaintiffs in the suit so proceeded with, and an order made under it, from which the person beneficially entitled under the first will, and *R. F. G.* beneficially entitled under the second, appeal ; but the Lords refuse to hear the appeal, for want of proper parties, and order it to stand over, with liberty to the parties to take such steps below as they should be advised.—*Gough v. Latouche*, 1 Dow & C. 485.

Bill then filed by *R. F. G.*, adding other parties, and praying to have the benefit of the revived suit, which is decreed him, but the Lords still refuse to hear the appeal, for want of proper parties, " more espe-

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cially considering that the appeal was from an order made on a decree obtained by persons who had no right, and in consequence of an agreement which did not appear to have been disclosed to the Court or the defendants, and might be deemed a fraud on the Court and the other parties ;" and the appeal ordered to stand over, but with liberty as before.—*Gough v. Latouche*, 1 Dow & C. 485.

R. F. G. then files another bill to have the benefit of the revived suit, and adding other parties, and stating a new case, viz., that the other parties were aware of the agreement from the first, and had acquiesced in it. The allegation denied by the answer and not proved, and the bill dismissed. Appeal from the decree of dismissal, but the decree affirmed by the Lords.—*Id.*

17. *English and Scotch Law*.—A trust deed for the benefit of *Scotch* creditors, made by one of three partners in two *Scotch* firms, all of whom are also partners in *English* firms, is not such an act in the ordinary course of the partnership business as to be valid against the other two partners, or their representatives ; and the assignee, under a general commission of bankrupt against all, cannot homologate it. The rules of *English* law are matters of evidence in *Scotch* Courts ; but the House of Lords, sitting as a court of appeal from the decision of a *Scotch* Court, is equally an *English* as a *Scotch* Court, and will act on its own knowledge of *English* law, and not be bound by the report of that law made by *English* lawyers to the *Scotch* Courts.—*Douglas v. Brown*, 2 Dow & C. 171.

18. *Record in Error*.—In error on a judgment given by an inferior Court on exceptions, the Court of Error is confined to the points raised by the exceptions, and cannot travel *dehors*.—*Fausset v. Carpenter*, 2 Dow & C. 232.

19. *Trustee—Costs*.—In the course of proceedings in a bankruptcy case, where a deed of trust had been executed, the trustee and one of the partners were served with diligence as havers, to produce all papers and documents

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relating to the subject matter of the cause. The partner had lost some of the papers before being served with the diligence, and the trustee had destroyed one of them after being served with it. Petitions were presented by the objectors, praying that the trustee might be censured, and that the partner might be censured, and that his discharge might be disallowed ; but the Court below dismissed the petitions, with all costs to be paid by the petitioners. This judgment was partly reversed by the House of Lords, and the cause remitted, with directions that the partner should not have his costs, and that the trustee should pay costs to the petitioners.—*Robertson v. Alexander*, 2 Dow & C. 312.

20. *Issues—Bond*.—Issues directed by the Master of the Rolls as to a bond merely upon the surmise and suggestion of a party, the bond being unobjectionable on the face of it, and all the evidence as to the circumstances under which it had been obtained being before his Honor, upon a report made after inquiry by the Master. The order, directing the issues, reversed by the House of Lords, and the cause remitted, with directions to his Honor to decide upon the matter himself.—*Nicol v. Vaughan*, 2 Dow & C. 420.

Where a Master reported that a bond was voluntary, and a party excepted, on the ground that the Master ought to have reported that the bond was partly for valuable consideration, and partly voluntary, and the party, at the argument on the exception, offered to withdraw it, and to have the bond considered as merely voluntary, as reported by the Master, his Honor the Master of the Rolls was of opinion that the party was bound by the exception to support the bond as partly for valuable consideration, and refused to allow the exception to be withdrawn.—*Id.*

21. *Fraud—Limitations—Appeal*.—Certain estates were devised to A. for life, then to B. for life, then to the sons of B. in tail male. During the tenancy of A., a bill was filed by a creditor of the testator, for a sale of part of the estates. No inquiry into

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the incumbrances affecting the estate was directed; and the trustees for the tenants in tail were not made parties to the suit. The lands were sold, and a conveyance executed by the officer of the court, and by A., and subsequently (though not till after a compromise had been effected) by B.; and the residue of the purchase money was ordered to be invested for the benefit of A.:

Held, that the bill was defective for want of proper parties; and the whole transaction was properly set aside after the death of the two tenants for life, and at the suit of the first surviving tenant in tail; and that the accounts were properly directed to be taken from the period of the death of the second tenant for life.—*Mullins v. Townsend*, 2 Dow & C. 430.

Where a plaintiff in a bill is abroad on foreign service with his regiment, the defendant who might have pushed on the proceedings, cannot on the plaintiff's return some years afterwards, discharge the bill on account of the delay.—*Id.*

Where a defendant in a bill thinks he can rely on an objection of want of parties to the bill, he must make that objection in the Court below, and will not be allowed to make it for the first time when the case comes before this House on appeal.—*Id.*

See *Bandon v. Becher*, 3 Cl. & F. 479.

22. *Evidence*.—The House of Lords, though a Court of Appeal, may and will, sitting as a Court of Equity, look at evidence which has been rejected in the Court below, to see whether if admitted, it ought to have made any difference in the decree, and though of opinion that it ought to have been received, will not remit the case to the Court below, if, on examining the evidence, it appears that if received it ought not to have made any difference in the decree.—*Maccabe v. Hussey*, 2 Dow & C. 440.

23. *Dismissal of Appeal*.—If the appellant does not appear to support his

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appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the House will afterwards exercise a discretion as to the costs.—*Gardiner v. Simmons*, 1 Cl. & F. 35.

24. *Counsel — Record — Amendments*.—This House will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument.

A Court of law has authority over its own record, which it may amend, even after error brought.

A Court of Error will not inquire into the propriety of amendments made in the Court below, but, though such amendments be made after error brought, will consider them as part of the original record subjected to their revision.—*Mellish v. Richardson*, 1 Cl. & F. 224.

See *Gregory v. The Duke of Brunswick*, 2 H. L. Cas. 415; *Garrard v. Tuck*, 8 Com. B. 257; *Mansell v. Reg.*, 8 E. & B. 94; *Mersey Docks v. Pen-shallor*, 7 H. & N. 343; *Tetley v. Wantless*, L. B., 2 Ex., 279.

25. *Counsel—Printed Cases*.—*Semble*, the House of Lords will, under peculiar circumstances, hear two counsel for a respondent, although to hear but one on each side may be part of the order made on advancing the appeal on the petition of the appellant.

Semble, also, that although it is usual, according to the orders of the House, to insert in the printed cases all the documents that are to be relied on, except the parties to save expense, come to an understanding to refer only to some, yet the House will hear the documents so referred to read at length at the table of the House, or by counsel at the bar; the opposite counsel being at liberty to examine and observe upon them.—*Dillon v. Parker*, 1 Cl. & F. 303.

26. *Foreign Sovereign*.—A foreign Sovereign suing in the Courts here, though suing in his political capacity, is in the same situation as an ordinary suitor in the Court of Chancery,

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and being a plaintiff in the Court of Chancery must answer a cross bill personally, and on oath.—*King of Spain v. Hullet*, 1 Cl. & F. 333.

27. *Delay*.—Where, in a suit between the representatives of the obligor in a bond, and the representatives of the obligees in the same, the latter had allowed three hearings and two appeals to this House to pass away, and then, for the first time, raised the question whether as a gift from a principal to an agent, the bond was not invalid in equity, and the Court below made a decree, allowing such question to be raised by suit, this House reversed the decree on the ground that the question ought to have been raised at an earlier period.—*Nicol v. Vaughan*, 1 Cl. & F. 495.

28. "*Issue Joined*."—An indictment was, after plea pleaded, and issue joined thereon, removed from an inferior Court into the Court of King's Bench in *Dublin*; the issue thus joined is not such "an issue joined in the Court of King's Bench" as will satisfy the words of the statute 17 & 18 Car. 2, c. 20, and cannot therefore be tried on the authority of that statute at the *Nisi Prius* sittings of that Court.—*Rouse v. The Attorney General*, 2 Cl. & F. 42.

29. *Hearing of Case*.—The House will not receive from the agent of a plaintiff in error a petition to refer a case to the judges, to consider the points of law which in his petition such plaintiff states to be involved in the case; but if counsel do not appear to argue for him, will proceed, on the motion of the counsel for the defendant in error, to affirm the judgment of the Court below.—*Ricketts v. Lewis*, 2 Cl. & F. 100.

30. *Question to be Argued*.—The House allowed a question of evidence to be argued, though it was not raised on the petition of appeal.—*Brown v. Tighe*, 2 Cl. & F. 396, 413.

31. *Form of Judgment in this House*.—Where there had been a suit in Chancery in *England* and a decree, and on the same rights a suit was instituted in the Court of Chancery in *Ireland*, and the bill dismissed as

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for want of jurisdiction, this House could either reverse that dismissal, and remit the case with directions, or could appoint a receiver, and take such other proceedings as the Court of Chancery in *Ireland* ought to have taken.—*Houlditch v. Donegal (Marquis)*, 2 Cl. & F. 470.

32. *Power to supply Omissions*.—If there is an accidental omission of form in the drawing up of a decree in the Vice Chancery Court, and that decree is appealed against, the Lord Chancellor may supply the omission; and this House will look at the decree as thus amended.—*Neodigate v. Neodigate*, 2 Cl. & F. 601.

33. *Bill of Review*.—Where a decree has been made against a party upon hearing, and he omits to present a petition for rehearing within the limited time, if he afterwards presents a petition complaining of some omissions in the decree, an order made in such petition supplying the omissions is irregular. The proper course would be to file a bill of review.—*Champernoune v. Brooke*, 3 Cl. & F. 4; 4 Cl. & F. 247.

34. *Review of Master's Report—Costs*.—*J. M.* had been *W. L.*'s solicitor, and his agent in obtaining money on mortgages and otherwise, and also receiver of the rents of his estates; on a bill filed by *W. L.* against him and the mortgagees, a decree was made for a general account against *J. M.*, and for the taxation of his bills of costs, notwithstanding there were settled accounts signed by *W. L.* and securities given by him, and the vouchers delivered up to him. The decree having directed the examination of the parties touching the matters in dispute, *W. L.* and *J. M.* filed interrogatories for their respective examinations. *J. M.* answered; *W. L.* refused to answer; whereupon an affidavit was filed by *J. M.*, pursuant to an order of Court, verifying the facts to which his interrogatories were directed:

Held, by the Lords, reversing the decision of the Court of Exchequer, that this affidavit ought to be taken as evidence of the advances of the

PRACTICE—continued.

money stated in it as constituting the debt claimed by *J. M.* from *W. L.*, and for which *J. M.* held and produced *W. L.*'s bond.

The Master having, pursuant to the decree, and to subsequent orders in the suit, made his general report, to which no objections were taken, nor exceptions allowed, nor did any error appear on the face of it :

Held, that the report could not, by an order made on the hearing for farther directions, be sent back to the Master to be reviewed.—*Morgan v. Evans*, 3 Cl. & F. 159.

On appeal and cross-appeal, the former being allowed and the latter being dismissed :

The Lords holding that the appellant in the appeal ought, as the representative of mortgagees in a suit originally instituted to redeem mortgages, to have had the final decree, with costs, in the Court below, gave him costs in the cross appeal by way of compensation.—*Id.*

35. *Trustees—Priority of Charge.*—A testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies, amounting to 10,000 *l.*, upon one of his estates, and another legacy of 20,000 *l.* upon a different estate. He then made other devises and bequests, and directed that a certain house and his residuary property should be sold in payment of his debts, and in ease of his real estates. The legatee of the 10,000 *l.* filed a bill to have the trusts of the will declared and executed. Creditors were directed to come in, and the estates specifically charged with payment of the debts were found not sufficient for that purpose. The Court afterwards directed a reference to the Master to take an account of the debts, and that in taking such account he should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the person entitled to the legacy of 20,000 *l.*, and the priority thereof. This legacy had been assigned to trustees under a marriage settlement, and

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they were not parties to the suit, but went in with others upon the reference to the Master. The Master made a report of the amount of the debts, and found that this legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment and bond debts of the testator :

Held, that such finding was right.—*Bouverie v. Norbury*, 3 Cl. & F. 247.

36. *Supplemental Bill for Discovery.*—A plaintiff filed a bill in the Court of Exchequer for an account of tithes, and for discovery and relief. The defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in lieu of tithes, but did not make the required discovery. By the practice of the Court of Exchequer in Equity, the answer of an infant cannot be excepted to for insufficiency. When the defendant came of age, the plaintiff filed a supplemental bill against him, alleging the existence of new facts, and praying for discovery and relief :

Held, that such bill could be supported.—*Waterford (Marquis of) v. Knight*, 3 Cl. & F. 270.

37. *Costs of Appeal.*—Upon an order remitting the cause to the Court below to take the accounts, &c., but containing no direction in respect to the costs of the appeal, the Court below, exercising its inherent jurisdiction, and holding that the relators should be fully indemnified, ordered payment of their costs of that appeal out of the ascertained balance, which, upon taking the accounts, appeared due from the corporation, though not paid into Court. This order was affirmed with costs.—*Corporation of Dublin v. The Attorney General*, 3 Cl. & F. 306.

See *ante*, CORPORATION, 24.

38. *Attorney and Client—Competency of Appeal—Costs.*—A client having required his attorney's bills of costs to be taxed, the attorney intimated to him that in that case he would make out new accounts, in which he would charge his full legal fees, which were not charged to that extent in the bills delivered, and

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accordingly he employed a person to remodel the accounts, and that person inserted in the new accounts fictitious charges, and increased other charges which were in the former accounts. The attorney denied all knowledge of the insertion of the fictitious charges, and abandoned them before the auditor to whom the accounts were, by order of Court, remitted to be taxed. The Court, by a subsequent order, instructed the auditor to report specially on the different subjects and points raised by the client's answers, imputing to the attorney a participation in the fabrication of the fictitious charges. These charges having been abandoned, the auditor made no inquiry into them, but reported on the other costs, taxing off about one-fourth of the whole bill, and no objection being lodged to that report when it came before the Court, it was confirmed with costs:

Held, that it was not competent for the client to appeal to the House of Lords against the order confirming the report, as he had not lodged objections in writing to it in the Court below.—*M'Alay v. Adam and Brown*, 3 Cl. & F. 385.

An appeal for mere costs does not lie, yet if an appeal is brought on a substantial question, not colourable, the House may deal with the costs awarded by the Court below. Accordingly, in an appeal which appeared to the House to have been brought for costs, but in which the order appealed from was varied materially in favour of the appellant, by the correction of an error, which however he might have prevented by a mere suggestion to the Court below, it was held that the appellant is not, on the ground of that variation, entitled to be absolved from costs; but under the circumstances the appeal was dismissed without costs.—*Id.*

See *Inglis v. Mansfield*, 3 Cl. & F. 362; *ante*, Costs, 1.

39. *Supplemental Bill*.—*G. P. Monck's estates in Ireland*—being charged with a jointure for Lady *Araminta*, his wife, by their marriage settlement, whereby also he covenanted for pay-

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ment to her of the sum of 300*l.* by his heirs, executors, or administrators, out of his real or personal estate, immediately after his decease,—were in the year 1777 settled to his own use for life, with remainder to *Henry Monck*, his eldest son in fee, subject to a trust sum for raising a sum to be applied as by deed or will he should appoint. He died in 1804, having by his will bequeathed, among other things, all rent and arrears of rent due to him to Lady *A.*, her executors and administrators, and he appointed her sole executrix. Lady *A.* declined to prove the will; *Henry Monck* obtained letters of administration with the will annexed, received the rents, &c., and died in 1815, having by his will devised all his real estates to trustees for the use of his two daughters, their husbands and issue respectively, in strict settlement, subject to a trust term for raising a fund to pay his debts, legacies, and annuities; and he thereby directed payment of 200*l.* a year to Lady *A.* and her assigns for her life, in addition to her jointure; and gave her a legacy of 500*l.* payable in 12 months after his decease; and he gave an annuity of 400*l.* a year to *Ann Monck*, his sister, in case she survived Lady *A.*, and upon condition of her releasing his real estates from all claims; and he appointed Lady *Elisabeth*, his wife, his executrix. She proved the will, and filed a bill in Chancery against Lady *A.* and *Ann Monck*, against the testamentary trustees of the last-mentioned term, and of the inheritance of the devised estates, and against the persons beneficially interested therein, praying that the trusts of the will might be carried into execution; and that accounts might be taken of the debts and legacies of the testator, and of the charges affecting the real estates, &c. Lady *A.* in her answer, claimed to be entitled to receive out of the real estates, in addition to her jointure, the said sum of 300*l.* with interest from her husband's death; and the said annuity of 200*l.* and legacy of 500*l.*, together with all the rents and arrears that were due to *G. P. Monck* at his death, and a proportionate value of the timber

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planted by him on the devised estates.

The usual decree for an account, &c., having been made in 1818, and Lady A. having died before any farther steps were taken in the cause, *Ann Monk*, her residuary legatee and sole executrix, proved her will, and carried in a charge before the Master in pursuance of the decree, and thereby claimed as such executrix the annuity of 200 l., and the legacy of 500 l., omitting the other claims made in Lady A.'s answer; and in her own right she claimed the annuity of 400 l., offering to release the estates of *Henry Monk* from all other claims. A final decree was made in that cause in 1821, and enrolled in 1822. In 1831 a second suit was instituted for sale of part of the devised estates, and a decree to that effect was made, and enrolled in 1832.

In 1834 *Marcus Monk*, the second son of G. P. and Lady A. *Monck*, having in 1832 obtained administration *de bonis non* to their respective estates, and also to the estate of his sister, *Ann Monk*, who died in 1830, moved the Master of the Rolls for leave to prove before the Master in the first cause the unproved demands of Lady A., or to file a supplemental bill; which motion being refused, he then moved the Lord Chancellor for leave to file a supplemental bill or such other bill as he might be advised. That motion also was refused. Upon appeal from his Lordship's order, the appellant sought to make a case for leave to prove before the Master, under the decree of 1821, the unproved demands of Lady A., or for a bill of review:

Held, by the Lords, without giving any judgment on the merits, that the Lord Chancellor properly refused the motion for leave to file a supplemental bill, and that the appeal was irregular in point of form, in asking for relief which was not asked of the Court below, the order of the Master of the Rolls refusing the relief not being appealed from.—*Monck v. Paget*, 3 Cl. & F. 430.

40. *Hearing of Appeal*.—Where there is an appeal against a decision of a

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Court of Equity, this House may consent to hear the appeal argued, but will not give judgment till the decree of the Court has been duly enrolled.—*Foster v. Cockerell*, 3 Cl. & F. 456.

41. *Statement of Fact*.—Where there is a statement of a fact in the case presented by the appellant to this House as the subject of appeal, the respondent, if he objects to such statement, should apply to have it struck out. If he omits to do so, such fact will be afterwards taken as uncontradicted.—*Turner v. Dickenson*, 3 Cl. & F. 593.

42. *Hearing of Appeal*.—On the day appointed for hearing an appeal, when its competency also was first to be argued by one counsel at a side, pursuant to an order of the House, the respondent's counsel appeared at the bar, and, no counsel or agent appearing for the appellant, prayed that the appeal be dismissed. The House required him to open a *prima facie* case against the appeal before they would dismiss it.—*Fraser v. Gordon*, 3 Cl. & F. 718.

43. *Costs—Fraud*.—Where a respondent did not appear to support a judgment of the Court below, this House reversed such judgment, but did not give the appellant the costs of the appeal.

Quære, whether such costs might not be given in a case where there was ground to impute fraud on the part of the respondent?—*Hamilton v. Littlejohn*, 4 Cl. & F. 20.

44. *Hearing of Appeal—Reply*.—Where a case has been ordered by the Appeal Committee to be argued before the House upon the question of the competency of the appeal, the House may or not, at its discretion, permit a reply.

An appeal on a mere point of practice is not competent.

Where a Court has treated one of its own proceedings as merely interlocutory and not final, that circumstance is decisive of the nature of such proceeding.—*Ferrier v. Howden*, 4 Cl. & F. 25.

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45. *Settlement under Order of the Court.*—

A settlement framed by the order of the Court, though not actually executed, was acted upon by the Court by several orders made in the cause in which such settlement was directed :

Held, that it could not afterwards be varied.—*Hodgens v. Hodgens*, 4 Cl. & F. 323.

46. *Dismissal of Appeal—Costs.*—Where an appellant, after receiving indulgence from the House, upon terms, fails to comply with the terms, or to appear on the day appointed for the hearing, his appeal will be dismissed with costs, upon motion, on behalf of the respondent, without requiring him to present a petition for the purpose.—*Mahon v. Irwin*, 4 Cl. & F. 559.47. *Opposition to Claim of Peerage.*—*F.*, whose petition to the King claiming the barony of *Slane* as heir male, was referred to the Attorney-General, but no report made thereon, was, upon petition to the House of Lords, and a statement by the Attorney-General to the Committee of Privileges, admitted to appear by his counsel and agents to oppose *B.*'s claim.—*The Slane Peerage*, 5 Cl. & F. 23.

If in a claim of peerage, an important question of law arises, the Committee will depart from the ordinary rule, and hear two counsel on each side.—*Id.*

48. *Reading of Documents not in Bill of Exceptions.*—A bill of exceptions tendered to the direction given by the judge to the jury, set forth the pleadings and evidence, and then referred to a lease, part of which was inserted by way of extract. The judgment of the Court on the bill of exceptions having been brought up by writ of error to this House, the counsel for the plaintiff in error proposed to read a part of the lease not extracted into the bill of exceptions :

Held, that they were not at liberty to do so.—*Gahway v. Baker*, 5 Cl. & F. 157.

49. *Decree by Consent.*—On a motion in

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the Court of Chancery for a new trial of an issue, the parties by their counsel consented to take the Lord Chancellor's decree on the evidence taken on the former trials, in order to avoid farther expense and delay :

Held, that such decree was subject to appeal to this House.—*Morris v. Davies*, 5 Cl. & F. 163.

50. *Order of Hearing.*—Where *A.* presents a petition of appeal, and *B.* presents a counter-petition, praying that the former may be dismissed as incompetent, *B.* is entitled to begin, on the argument as to the competency of the appeal.—*Gray v. Forbes*, 5 Cl. & F. 356.51. *Notice.*—Where there are several co-heirs to a dignity, and some only claim it, they must give notice to the others.—*Vaux Peerage*, 5 Cl. & F. 626.52. *Hearing Counsel.*—Although the judges attend to assist the Lords, yet if, after hearing the case made for the plaintiff in error or appellant, no doubt is entertained by any of them that the judgment of the Court below was right, the Lords will not hear the defendant or respondent.—*The King v. Johnson*, 6 Cl. & F. 41.53. *Account with Rests—Costs.*—The order to take an account with rests, is always a matter entirely discretionary with the Court on a consideration of the circumstances.—*Court v. Roberts*, 6 Cl. & F. 65.

An original appeal may be dismissed without, and a cross appeal dismissed with costs, according to circumstances.—*Id.*

54. *Observations on Inadmissible Evidence.*—Documents put before the House by a claimant, although not admitted in evidence, held to be fit matter for observation by his adversary's counsel to prevent prejudice.—*Earl of Roscommon's Claim*, 6 Cl. & F. 97.55. *Parties—Time of Appeal—Co-Defendants—Partners—Evidence.*—*Sembla*, a bill to set aside a purchase may be maintained by some partners of a company, including the actual pur-

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chasers, without making all the partners parties, against a vendor who is not a partner, *et vice versa*.—*Atwood v. Small*, 6 Cl. & F. 232.

Semble, an order to amend after replication, by converting a plaintiff into a defendant, though opposed by the defendant, is consistent with the practice of the Court of Exchequer.—*Id.*

All objections to the form and competency of an appeal to this House, should be made before the appeal is set down for hearing, so that it may be referred to the Appeal Committee.—*Id.*

Although the time for appealing from an interlocutory order in a cause has expired, still, if the final decree is appealed from in time, the right to appeal from the order is saved.—*Id.*

The answer of one defendant cannot be read for a co-defendant, either as evidence, or to show what the issue is between the latter and the plaintiff, except where a defendant has been in partnership with a plaintiff, and in that case his answer may be read for the co-defendant, as an admission or declaration in partnership transactions. But if not rendered in the Court below, it cannot regularly be read on appeal.—*Id.*

This House may, under circumstances, depart from the general rule, and to satisfy its conscience, look into instruments that were not tendered to the judge who made the decree appealed against.—*Id.*

56. *Many Parties charged with Fraud—Issues*.—Where a plaintiff in a bill charging fraud against a defendant, joins other person as parties defendants who might otherwise be witnesses for the principal defendant, the House of Lords will, on appeal, order issues to be directed, and those persons to be examined on the trial, or their depositions to be read if they have been examined in the cause and died before the trial of the issues.—*Rhodes v. De Beauvoir*, 6 Cl. & F. 532.

57. *Stay of Execution*.—Notice of an appeal does not stay interim execution

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of the decree; that is entirely in the discretion of the Court.—*Gordon v. Clyde*, 6 Cl. & F. 539.

Where a respondent has not appeared to an appeal until it is appointed for hearing, he may still, by leave of the House, lodge his printed cases, and at the same time be heard at the bar in support of the decree; but although he has a clear case on the merits, and the appeal is dismissed, he will not be allowed his costs.—*Id.*

It is not a valid objection to a warrant for interim execution for costs, that the party obtaining it sued in *forma pauperis*, or that he did not lay before the Court, with his petition for the warrant, a printed copy of the appeal to the House of Lords, the Act 48 Geo. 3, c. 15, requiring a copy only to be produced.—*Id.*

58. *Practice in Divorce Bills*.—In suing out a divorce bill, the Standing Order (No. 141), requiring the petitioner to produce a record of a judgment in an action for criminal conversation against the adulterer, will be dispensed with, where it is shown that such action was impracticable.—*In re Coode* 6 Cl. & F. 567.

59. *Divorce*.—The production of a record of a judgment at law for criminal conversation was also dispensed with in this case, where during a voluntary separation of the petitioner and his wife, she committed adultery, of which he was not informed till after the death of the adulterer.—*In re Lardner*, 6 Cl. & F. 569.

Held also, that a lapse of nine years from the admitted discovery, and of 19 years from the fact of the wife's adultery, was not a bar to the petitioner's right to a divorce *à vinculo*, he having shown that he was not able, for want of funds, to apply to Parliament sooner.—*Id.*

60. *First Verdict on Second Trial*.—Where a Court of Equity directs that a new trial of an issue should be had, the verdict on the first trial need not be set aside, as it forms no ground for any subsequent proceedings of such Court. Nor ought either party to be allowed to give such verdict in evidence on the second trial.—*O'Connor v. Malone*, 6 Cl. & F. 572.

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61. *Necessary Application to Court Below.*

--The House of Lords will not give relief to an appellant against an order of which he complains by his petition, unless he has taken the proper course to obtain relief in the Court below.--*Tommey v. White*, 6 Cl. & F. 786.

62. *Opposition to Claim of Peerage.*

Coheirs of a peerage in abeyance will be allowed, on petition to the House, to appear by counsel before the Lords' Committees on Privileges, to watch the evidence on behalf of a claimant whose petition to the Crown is referred to them; but if he claims the dignity he must petition the Crown.--*Camoy's Peerage*, 6 Cl. & F. 789.

63. *Enrolment—Rehearing.*—An order having been obtained for a rehearing, upon a motion to discharge it on the ground that the decree was enrolled, the Lord Chancellor of *Ireland* ordered the enrolment to be opened, without any application to vacate it; then reheard the cause, and decreed:

Held, that the orders and proceedings were irregular; that although the opening of an enrolment is in the discretion of the judge, with which a Court of Appeal would not interfere, still that discretion ought to be regulated by precedent and authority.--*Sheehy v. Lord Muskerry*, 7 Cl. & F. 1.

Upon a rehearing, a party is not bound by untrue recitals, inserted by mistake in the former decree.--*Id.*

64. *Procedure Below.*—The House of Lords will, on appeal, interfere with the practice of the Courts below in respect of procedure, when the form of procedure admitted below appears to be incompetent, and to lead to dangerous results.--*Fleming v. Dunlop*, 7 Cl. & F. 43.65. *Partner bound by his own Delay—Form of Judgment.*—*Semble*, that a partner who was not a participator in the delict, was legally entitled to indemnity from those who were, although he consented to the penalty:

But held, that by having omitted all opportunities of taking a decision on

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the legal question in the Court below, and being unable to appeal against the verdict, he was precluded from having a decision on that question from the House of Lords.--*Campbell v. Campbell*, 7 Cl. & F. 166.

The summons in the action having claimed a certain sum from the defenders jointly and severally, and the verdict having found them simply indebted, or in a different sum as libelled:

Held, that there is no inconsistency between that and the judgment decreeing against the defenders jointly and severally, for payment of the sum so found libelled.--*Id.*

66. *Party bound by Issue.*—A party after failing in the defence set up by his answer, is not to be permitted to try another defence depending on matters not put in issue by the answer, and which, therefore, his adversary had no opportunity of disproving.--*Persse v. Persse*, 7 Cl. & F. 279.67. *Delay—New Matter.*—It requires a very strong case to induce the Lords to reverse a decree nine years after its date, especially if that decree established no fact, adjudicated no right, but merely directed proper inquiries to obtain information for the Court, and the objects of it were exhausted, the appellant himself having joined in the inquiries and failed.--*Copland v. Toulmin*, 7 Cl. & F. 350.

It is irregular by an exception to a report, to raise a proposition foreign to the subject matter of the report.--*Id.*

68. *Adequate Consideration—Heir.*—A person seeking the benefit of a dealing with an heir expectant, for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables.--*Aldbrough (Earl of) v. Trye*, 7 Cl. & F. 436.

The rule that a fair price is to be given, is sufficient protection to an heir expectant or reversioner; but

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the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all.—*Aldborough (Earl of) v. Trye*, 7 Cl. & F. 436.

A sale by public auction is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth.—*Id.*

A party comes too late to complain of a decree after joining in the inquiry directed by it, and the result is against him; and he is not entitled to question the Master's report after it is confirmed, having taken no exceptions.—*Id.*

69. *Printed Cases — Counsel.*—It is improper to print in the cases or appendix, the interrogatories in a bill or other unnecessary matter.—*Booth v. Bank of England*, 7 Cl. & F. 509.

If the second counsel for an appellant cannot attend in his turn, the House will hear him afterwards in reply to the respondent's counsel, but will confine him strictly to the reply.—*Id.*

70. *Hearing of Appeal.*—An appeal was called on in its regular course; the appellant's counsel were not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over, and ordered the appellant to pay the costs of the day.—*Godson v. Hall*, 7 Cl. & F. 549.

71. *Remit — Inquiry.*—By a settlement made on the marriage of A., certain premises were assigned to trustees for his use for life; and power was also given him "to raise by deed, mortgage, or any other writing, a sum of 1000 l. to be applied to any purpose that the said A. should please, but the same was not to be raised by way of sale of the said lands." A. raised the 1000 l. by way of mortgage of the settled premises, and afterwards became bankrupt; his assignee sold his interest as such assignee in the settled premises, to B., who also purchased the mortgage. A. afterwards died. The Court below having directed an inquiry into the

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value of the estate at the time of the assignment, and the amount of B.'s interest therein, this House reversed the order directing such inquiry, and, without making any order, remitted the case with the declaration of what were the nature and extent of B.'s rights, leaving it to the Court below to carry that declaration into effect.—*Simpson v. O'Sullivan*, 7 Cl. & F. 550.

72. *Repleader.*—The Court below in which the action is brought may award a repleader, but a Court of Error cannot award it.—*Gwynne v. Burnell*, 7 Cl. & F. 572.

73. *Remit with Inquiry.*—The House, in remitting a case for inquiry on a main question, will, to save delay and expense, direct inquiries on other questions consequential upon the probable finding on the main question.—*Jackson v. Jackson*, 7 Cl. & F. 977.

74. *What Matters may be Discussed.*—Matters not printed in the papers cannot be made the subject of argument before the House.—*At Can v. O'Ferrall*, 8 Cl. & F. 30.

The House, in remitting a case to the Court below to carry its directions into effect, will, where necessary, not merely declare the principle of its order, but state these directions fully on the face of the order.—*Id.*

75. *Legitimacy — Infant — Issue.*—On a bill to carry the trusts of a will into effect, two questions were raised, one of law, on the construction of the will, the other of facts as to the plaintiff's legitimacy, to be ascertained by the trial of an issue:

Held, that the judge exercised a sound discretion in directing the issue first, and declining to decide the question of law until the plaintiff established his right to ask for that decision, by showing that he filled the character he had assumed.

Quere, whether Lord Eldon meant what is ascribed to him, as approving the contrary practice in *Gordon v. Gordon* (3 Sw. 468)?—*Malone v. Malone*, 8 Cl. & F. 179.

Where a plaintiff claimed as heir

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male of *R. M.*, stating in his bill that he was *R. M.*'s eldest son, born after his marriage with plaintiff's mother, and naming a specific date of the marriage:

Held, 1st. That the question of plaintiff's legitimacy would be satisfactorily determined by an issue in terms, "to try whether he was the heir-at-law of *R. M.*," &c.—*Malone v. Malone*, 8 Cl. & F. 179.

2nd. That although a marriage of the date stated in the bill, and proved by the depositions of the witnesses in the cause, disproved the plaintiff's title, and a marriage of a different date, establishing his legitimacy, was proved by the same witnesses at the trial of the issue, these were not sufficient grounds for dismissing the bill without farther investigation, it appearing that the witnesses on both occasions deposed correctly to the main facts, but were under a misapprehension of the dates.—*Id.*

Where a Court of Equity directs an issue in a cause to which there are many parties, and select some to have the conduct of the trial, giving all leave to attend, all the parties are bound by the result.—*Id.*

An order, directing an issue "with the consent of all parties in the cause," is erroneous, so far as it purports to be with the consent of an infant party.—*Id.*

Quere, whether if the infant gave consent, he is bound by it? But if the order for the issue is a right order to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not; especially as he was relieved from the effect of the consent, by being allowed, on coming of age, to make a new defence.—*Id.*

Quere, whether it is clear on the authorities, that an infant defendant, in a case such as this, is entitled, after coming of age, to put in a new answer and make a new defence?—*Id.*

76. *Hearing—Costs.*—If a party should make default on the day appointed for the hearing of his cause, he must pay the opposite party not in default, the costs of the day; and if it

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should appear that he has not instructed counsel for that day (not intending to appear in person), his cause may be struck out of the list.—*Flight v. Thomas*, 8 Cl. & F. 231.

77. Where respondents have different defences, the House will hear two counsel for one on the whole case, and two for the other on the points wherein their defences differ.—*Horne v. Pringle*, 8 Cl. & F. 265.

78. *Objections on Appeal.*—The House will not permit parties on appeal to raise objections which they did not raise in the Court below.—*Kay v. Marshall*, 8 Cl. & F. 245.

79. *Powers of a Court of Equity.*—It is desirable that Courts of Equity should have more power to compel a plaintiff, on dismissing his bill, to do justice to a defendant; but in some cases justice would not require, nor would it be for the party's benefit, that the relief he asked should be granted; such relief, if just and beneficial, could be given by the decree of dismissal, but ought to be made on special application.—*Haig v. Homan*, 8 Cl. & F. 321.

The mere propriety of a former decree cannot be questioned by bill of review; it is only where there is error on the face of it that such a bill can be sustained.—*Id.*

80. *Specific Performance—Cause and Cross Cause.*—Courts of Equity do not decree specific performance of incomplete gifts.—*Callaghan v. Callaghan*, 8 Cl. & F. 374.

Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract.—*Id.*

Where there are a cause and a cross cause, and the decree in the cause only is appealed from, the cross cause is in no respect before the House.—*Id.*

81. *Multifariousness.*—It is difficult to lay down rules as to multifariousness applicable to all cases, but if a case is an entire case as against one defendant, an objection for multifariousness cannot be made by

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another defendant who is connected only with some portion of the whole case.—*Parr v. The Attorney General*, 8 Cl. & F. 409.

82. *Enrolment*.—The House of Lords will not hear an appeal against any decree or order of any branch of the Court of Chancery, unless it has been enrolled.—*Andrewes v. Wallon*, 8 Cl. & F. 457.

Where an appeal against a decree and orders came to be heard, and the respondent's counsel took a preliminary objection that they were not enrolled, the House, under certain circumstances, has allowed the appeal to stand over for that purpose, without ordering the appellants to pay the costs of the day.—*Id.*

83. *Delay—Technical Objections*.—The first decree in certain suits which had been in existence for some years was made in the year 1813; the litigation went on, upon the footing of that decree, between the parties and others interested in the same transactions, until 1838, when a decretal order for the revival and execution of all former decrees and orders was made. These decrees and orders, and the final decretal order of 1838, were appealed against: Held, that after such a delay, and under such circumstances, this House would not set aside any of the decrees or orders upon technical objections which did not affect the merits of the case.—*Lawrence v. Blake*, 8 Cl. & F. 504.

84. Where a decretal order, which was not alleged to be made on the appearance of all the proper parties, directed the revival and execution of several preceding decrees and orders, but the suit in which it was made was regular, for some purposes at least, the House reversed it, with directions, and remitted the case to the Court below, to deal with the suit so as to advance the justice of the case, regard being had to the decision of this House as to the earlier decrees and orders, the validity of which the House had sustained.—*Id.*

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85. *Dismissal*.—Where no appellant appears to support an appeal, the only order the House can make, will be to dismiss the appeal for want of prosecution, with costs.—*Scanlan v. Usher*, 8 Cl. & F. 561.

See *Martin v. D'Arcy*, 3 H. L. Cas. 698.

86. *Decree—Impeaching Securities*.—Where a plaintiff claims the full amount of securities, and the defendant offers to pay a part only, alleging an equity against the residue, a decree giving the plaintiff an option to accept the offer, or have his bill dismissed, is irregular, as it does not declare whether the plaintiff is entitled to the whole sum or to part only.—*Carter v. Palmer*, 8 Cl. & F. 688.

The proper course would be to make a decree giving effect to the securities to the extent of the whole sum due on them, but without prejudice to the defendant's right to file a cross bill to assert his equity.—*Id.*

To enforce a defendant's equity by impeaching securities, a cross bill is necessary according to the practice in *England*; but *semble*, it may be done by answer in *Ireland*.—*Id.*

87. *Supplemental Cases*.—Supplemental cases need not be lodged upon reviving an appeal, which became abated, after a full hearing.—*Hollier v. Eyre*, 9 Cl. & F. 1.
88. *Decree in Annuity Suit*.—Decree dismissing a bill for arrears of an annuity on the ground of presumed satisfaction and lapse of time, varied by directing the bill to be retained for 12 months, the plaintiff to be at liberty to establish her claim in an action at law.—*Haworth v. Bostock*, 9 Cl. & F. 59.
89. *Dismissal—Costs*.—Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.—*Sherburne v. Middleton*, 9 Cl. & F. 72.
90. *Enrolment*.—The House will not hear an appeal against any order or decree of the Court of Chancery that is not enrolled, if the objection is

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taken. And if the appeal be against a stale order or decree, time to enrol it will not be granted unless the merits appear to be with the appellant. — *Broadhurst v. Tunnicliff*, 9 Cl. & F. 71.

91. *Dismissal*.—Where no person appears on the part of the appellant, when his appeal is called on, and the agent only of the respondent appears, alleging that he had retained counsel, and praying that the appeal be dismissed with costs, it will be dismissed with costs.—*Murphy v. Conway*, 9 Cl. & F. 73.

92. *Costs*.—An appellant had, under the decree of the Court below, paid the costs of a suit. That decree was reversed in this House, and the bill against the appellant ordered to be dismissed with costs. This House, however, would not make an order for him to be repaid such costs, but left him to apply to the Court below on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.

93. *Counsel's Reply*.—Where the Crown by any of its officers, is a party respondent in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply, after the reply for the appellants.—*Lord Advocate v. Lord Douglas*, 9 Cl. & F. 174.

94. *Inquiry as to Value*.—*W. C.* being seised in fee simple of divers parcels of lands and other hereditaments, all subject to an annuity for the life of his mother, and to a portion for his brother, mortgaged one parcel, and sold others. Under a decree for raising the portion, afterwards made against *W. C.*, several parcels of the then unsold lands, including the mortgaged premises, were sold in the Master's office subject to the annuity, but the deeds of conveyance to the purchasers did not state whether exclusively subject thereto, or rateably with other parcels that still remained unsold. The mortgagee's representative filed a bill against these purchasers and *W. C.* for an indemnity for the mortgage out of the unsold lands, free from the annuity, charging that, by agreement between these

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defendants, the parcels sold in the Master's office were to be exclusively subject thereto, and on that account produced less by the value of the annuity than if they were sold subject thereto rateably with the parcels that still remained unsold. There was no proof in the cause of the alleged agreement :

Held, that a decree directing inquiries as to the value of the parcels sold, to be made by the Master was erroneous, as such inquiries were immaterial to the issue between the parties ; and that the bill ought to have been dismissed with costs, without prejudice to any bill that might be afterwards filed for apportioning the annuity on all the lands originally charged therewith. — *Siree v. Kirwan*, 9 Cl. & F. 716.

95. *Exceptions — Misdirection — Patent*.—If upon exceptions to the judge's charge to the jury, the superior Court should see that there was a misdirection, calculated to mislead the jurors in their verdict, the Court has no discretion, but must allow the exception, and direct a new trial, even though the verdict may be right.—*Househill Coal Company v. Neilson*, 9 Cl. & F. 788.

Secus, in case of a motion for a new trial on the ground of misdirection. —*Id.*

The 5th section of the Act 5 & 6 Will. 4, c. 83, requiring a defendant to an action for infringing a patent, to give the plaintiff notice of the objections on which he means to rely at the trial, does not apply to *Scotland*, the practice there, of confining the evidence at the trial to the averments on the record, being a sufficient protection against surprise :

Held, that the want of such averments on the record cannot be supplied by a notice of objections lodged in process.—*Id.*

96. *Costs*.—Where a judgment of the Court below is reversed in this House, and the House pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the appellant the costs of the suit in the Court below, which he would

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have had there, had the proper judgment been pronounced in the first instance in that Court.—*Mackery v. Ramsays*, 9 Cl. & F. 818.

This House never gives costs against a party coming to sustain a decree in his favour.—*Id.*

97. *Appeal in Violation of Agreement.*—A cause had been heard in the Court of Chancery in *Ireland*, and a decree made; the cause was re-heard, and the decree affirmed. The party who had failed in the suit petitioned for a second re-hearing, and undertook not to appeal from the decision of the Lord Chancellor on such re-hearing, but to abide by it. The Lord Chancellor affirmed the original decree, and in the last decree set forth the undertaking in consequence of which he had re-heard the cause. The party who had given the undertaking brought an appeal. The Lords, in their discretion, refused to hear it.—*Woodmason v. Doyne*, 10 Cl. & F. 22.

See *Farrell v. Gleeson*, 11 Cl. & F. 702.

98. *Infant Ward of Court.*—*Quere*, whether the bill filed to make an infant a ward of Court, ought not to allege some right or claim of the infant to property within the jurisdiction?—*Johnstone v. Beattie*, 10 Cl. & F. 42.
99. *Counsel's Signature to Appeal.*—The Standing Order No. 58, directing that "no counsel shall sign an appeal to this House unless he was of counsel in the same cause in the Courts below, or attends as counsel at the hearing at the bar of this House," is not to be departed from, although there may be exceptions allowed.—*Price v. Seeley*, 10 Cl. & F. 28.
100. *Judges' Opinions.*—The House of Lords has a right to require the judges to answer abstract questions of existing law.—*Macnaghten's Case*, 10 Cl. & F. 200.
101. *Point Raised on Appeal.*—Upon appeal against a decree dismissing a bill, the respondent may, in supporting the decree, raise points in his case, and

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arguments that were not raised in the Court below.—*Wilby v. Mangles*, 10 Cl. & F. 215.

102. *Hearing of Counsel.*—In a case where a private party had presented an appeal, and the Attorney General, on behalf of the Crown, had presented a cross appeal against the same decree, the counsel for the private party were heard continuously on both appeal and cross appeal, and then the counsel for the Crown were heard on both, and the senior counsel for the private party was heard in a general reply, though the case was one in which, being a matter of revenue, the Crown was directly concerned.—*Drake v. The Attorney General*, 10 Cl. & F. 257.
103. *Practice in Crown Escheats.*—*Semble*, The Courts lean strongly towards applications for farther investigation, in cases in which property falls to the Crown, as that generally happens, not from want of next of kin, but from failure of legal evidence of their title.—*Robson v. The Attorney General*, 10 Cl. & F. 471.
104. *Hearing of Counsel.*—It is an inflexible rule of the House to hear only two counsel for each party in any one case; and the House will not avoid the effect of this rule by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply.—*The Queen v. Millis*, 10 Cl. & F. 534.
105. *Discretion of the Judge.*—A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the judge, and not upon principle.—*Ironmongers Company v. The Attorney General*, 10 Cl. & F. 908.
106. *Costs—Form of Judgment of the House.*—A declaration consisted of two counts. The defendants pleaded six pleas, four to the first, and two to the second count. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went to trial on the issues, and a verdict

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was found for the plaintiff on the issues raised on the first count; as to the issue on the second count, the jurors were discharged by consent; judgment was afterwards entered for the plaintiff. On a writ of error, the Exchequer Chamber affirmed the judgment of the Common Pleas, except as to the demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the second count; a general order was made for the defendants to pay costs to the plaintiff, but no order was made to except out of the general costs, the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute for delay in the execution of his judgment, by reason of the writ of error:

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff.—*Bourne v. Gutliff*, 11 Cl. & F. 45.

This House pronounced the same judgment which the Court of Exchequer Chamber ought to have pronounced.—*Id.*

107. *Evidence in Reply*.—In a claim of peerage where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory kind, be allowed to produce additional evidence confirmatory of the first.—*Sussex Peerage Case*, 11 Cl. & F. 85.

Before the claimant's junior counsel summed up the evidence, previously to the opening of the case on the part of the Crown, the counsel for the Crown were required by the Committee to declare whether they would, or would not, call evidence on a question of foreign law, so as to enable the claimant's counsel to determine whether they would then (as they could not afterwards) produce any additional evidence on that question.—*Id.*

108. The 56 Geo. 3, c. 87, is repealed by

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the 1 & 2 Vict. c. 37; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions, in Ireland.—*O'Connell v. The Queen*, 11 Cl. & F. 156.

The Court of Queen's Bench in *Dublin* in Hilary Term, made an order for a trial at bar in that term; and another order declaring that, in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial; and that every day so appointed should be deemed a part of the Hilary Term:

Held, that this order was properly made under the authority of 1 & 2 Will. 4, c. 31, s. 3, and had the effect of duly continuing the trial during the days appointed.—*Id.*

After that order, which was entered on the record, a continuance was also entered from the day in vacation on which the verdict was found, until the following term:

Held, that there was no discontinuance.—*Id.*

Several defendants charged in one indictment with different illegal acts, severed in their defence; and, being convicted and sentenced to different punishments, brought separate writs of error:

Held, that they were entitled to appear by several counsel, and that such counsel were severally entitled to reply.—*Id.*

The counsel for the Crown, where the Crown is the defendant in a writ of error, is not necessarily entitled to the final reply, though the Crown is the real litigant party.—*Id.*

109. *Notice—Waiver*.—In proceeding under a Railway Act, where the Act required a notice to be given, the objection arising on account of the want of such notice, was held to be waived by the party to whom it ought to have been given appearing, and not protesting against the proceedings on that account.—*Taylor v. Clemson*, 11 Cl. & F. 610.

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In such a case, parol evidence of what was considered, in the lifetime of the testator, to be the extent of the lands constituting the estate, is receivable.—*Ricketts v. Turquand*, 1 H. L. Cas. 472.

128. *Quashing Writ of Error*.—If a writ of error does not lie in a particular case, the Court of Error may properly, upon a rule obtained for that purpose, order the writ to be quashed.—*King v. Simmonds*, 1 H. L. Cas. 754.

129. *Costs—Appendix*.—The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact.—*Piers v. Piers*, 2 H. L. Cas. 331.

The House strongly condemned the custom of each party printing an appendix to his case, and desired that in future a joint appendix might alone be printed.—*Id.*

130. *Improper Parties*.—The circumstance that an insolvent has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.—*Rochfort v. Buttersby*, 2 H. L. Cas. 388.

131. *Amending Record Below*.—Where it appeared to the House that a mistake committed by an officer of the Court below in entering the judgment of that Court, was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over to allow the parties to apply to the Court below to amend the error. The House made this order, after referring to the report of the opinions of the judges of the Court below, as stated in the printed reports of the decisions of that Court.—*Gregory v. Brunswick (Duke of)* 2 H. L. Cas. 415.

132. *Fraud—Decree*.—If a bill alleges fraud, which is not proved, and also alleges other matters which, being proved, are grounds for a decree, the

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proper course is to dismiss so much of the bill as is not proved, and to give so much relief under the circumstances as the plaintiff may be entitled to.—*Archbold v. Commissioners of Bequests for Ireland*, 2 H. L. Cas. 440.

133. *Form of Judgment*.—An *allocutus* whether "the justices and commissioners ought not, on the premises and verdict aforesaid, to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage.—*O'Brien v. The Queen*, 2 H. L. Cas. 465.

134. *Form of Judgment*.—Two actions were brought in *Scotland*, both arising out of the same cause. They were conjoined. The Lord Ordinary pronounced a judgment which, in point of form, applied to one only, but which in substance, affected both. His judgment was appealed against in the Court of Session, which made a decree, disposing in form as well as substance, of both actions:

Held, that a decree so made, was correct.—*Burnes v. Pennell*, 2 H. L. Cas. 497.

135. *Costs—Officers of State in Scotland*.—The officers of State in *Scotland* obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea-shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but was affirmed without costs.—*Smith v. Officers of State in Scotland*, 2 H. L. Cas. 807.

136. *Dissenters—Trust Fund*.—A decree which declares Trinitarian Protestant Dissenters alone to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the misapplication of the fund, by allowing Unitarian Protestant Dissenters to administer it with them.—*Drummond v. The Attorney General of Ireland*, 2 H. L. Cas. 837.

137. *Exception Abandoned but Argued*.—An exception which appeared on the

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face of the bill of exceptions, but had been abandoned in the Court below, was allowed to be argued in this House. — *Bain v. Whitehaven Railway Company*, 3 H. L. Cas. 1.

138. *Exceptions—Explanation.*—A bill of exceptions was tendered to a judge's direction, and, under the 55 Geo. 3, c. 42, s. 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the Court:

Held, that the introduction of this explanation was highly irregular; but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed.—*Glasgow (Earl) The Hurler Alum Company*, 3 H. L. Cas. 25.

139. *What Decrees included in an Appeal—Judgment here conclusive.*—*Semble*, that a decree appealed from, but not adjudicated on farther than the dismissing the appeal generally, may be included in a subsequent appeal.—*Tommey v. White*, 3 H. L. Cas. 49.

Semble, also, that decrees and orders which have not been enrolled, may, after any length of time, on being enrolled, be brought under appeal, with a recent order made in the same cause, and duly enrolled.—*Id.*

A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament.—*Id.*

140. *Devisavit Vel Non—Second Trial.*—There is no absolute rule in a Court of Equity requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the first trial has terminated against the heir-at-law, if the judge in equity is satisfied that no new light can be

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thrown on the subject by a farther investigation.—*McGregor v. Topham*, 3 H. L. Cas. 132.

Though there may be an outstanding legal estate, which compels the heir-at-law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory.—*Id.*

In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined.—*Id.*

141. *Trusts—Printing.*—Where trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought, in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding.—*Prendergast v. Prendergast*, 3 H. L. Cas. 195.

The costs of the appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed.—*Id.*

142. *Costs.*—This House, in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gives the costs in the Court below.—*Attorney General v. Coz*, 3 H. L. Cas. 240.

143. *Right to Begin.*—Where a petition to dismiss an appeal for incompetency has been directed by the Appeal Committee to be argued at the bar of the House, the counsel for the petitioner is entitled to begin.—*Geils v. Geils*, 3 H. L. Cas. 280.

The petition was dismissed, but the costs were reserved.—*Id.*

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144. *Costs in Divorce*.—In a suit for a divorce *à mensâ et thoro*, the wife obtained judgment in the Court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one: but the interlocutor was allowed to stand, so far as it gave the wife the costs in the Court below.—*Paterson v. Paterson*, 3 H. L. Cas. 308.

The wife, however, was not allowed the costs of the appeal. (*Quære*).—*Id.*

145. *Costs*.—A decree was made in 1847, directing a reference to the Master to make certain calculations on bases laid down in that decree. The decree was not then appealed against; the inquiry took place in the Master's office, and he made his report, which the defendants in the suit excepted to; these exceptions were overruled, and the report confirmed, but no costs were given on either side. After all these proceedings had taken place, the defendants appealed against the decree itself. The decree was reversed, and the cause remitted, with directions; but no order was made as to the costs incurred in the Court below between the date of the decree and of the appeal, the Court below being left to deal with them as it might think fit.—*Blackwall Railway Company v. Letts*, 3 H. L. Cas. 471.

146. *Practice as to Accounts—Advancing Appeal—Part of a Decree*.—The House, in disposing of a case where there were to be calculations of payments on one side and of interest on the other, laid down certain principles, and desired the parties on both sides to furnish an agreed statement of facts as to the sums to which these principles were to be applied. The House required this statement of sums to be delivered in before the Minutes of the Order of the House were given to the parties, and refused to hear counsel on the subject of this statement and of the Minutes.—*Birch v. Joy*, 3 H. L. Cas. 565.

An application to advance an appeal for hearing must be made to the

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Appeal Committee, and not to the House.—*Birch v. Joy*, 3 H. L. Cas. 565.

Where a party appealed to the House against a portion of a decree which had been made in the Court below, and that portion was affirmed, he was still at liberty (if within time) to appeal against the other portion of the same decree.—*Id.*

147. *Opinions of Judges*.—The Lords allowed the opinion of a learned judge, who had been present at the hearing of the cause, but who was unable to attend when the judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course.—*Stephenson v. Higginson*, 3 H. L. Cas. 638.
148. *Dismissal*.—In an appeal from a decree in the Court of Chancery where no one appeared for the appellant, but counsel did appear for the respondent, the appeal was, without the respondent's counsel being called on, dismissed with costs.—*Martin v. D'Arcy*, 3 H. L. Cas. 698.
149. *Affirmance on Amendment*.—The name of a person who had purchased shares in a joint-stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect.—*Henderson v. Sanderson*, 3 H. L. Cas. 698.
150. *Affirmance without Hearing*.—In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the Court below was then affirmed with costs.—*Jones v. Cannock*, 3 H. L. Cas. 700.

151. *Proceedings in Peerage Claims*.—Where the Committee for Privileges required certain evidence in support of a claim of peerage, which evidence the claimant possessed, but had not produced, because it had been sup-

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posed that it would be taken as produced, on account of its having been received in a previous claim of the same peerage, the Committee adjourned in order to allow its production.—*The Earl of Donoughmore's Claim*, 3 H. L. Cas. 822.

152. *Judges' Opinions*.—The judges were summoned to answer questions of law; they differed in opinion on these questions. Most of the judges being on circuit, two of their number attended on a day fixed by the House for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The House adjourned the matter till the judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was also stated that this permission to dispense with the attendance of any of the judges to whom questions had been put, must not be drawn into a precedent.—*Egerton v. Brownlow*, 4 H. L. Cas. 1.

153. *Previous Decree*.—Where there had been a previous decree, in substance the same as that which was appealed against, though made in a different suit, and by a different judge, the appeal was dismissed with costs.—*Russell v. Dickson*, 4 H. L. Cas. 293.

154. *Fraud*.—A judgment of this House given on appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal, and the order constituting the judgment thereon.—*Ex parte White v. Tommney*, 4 H. L. Cas. 313.

A decree in Chancery was made in January, 1835, and enrolled in May of that year. A petition for leave to appeal against it (the proper time for appealing having gone by) was presented in February, 1839, and refused. The party who was dissatisfied with the decree filed a bill of review in 1844. A demurrer to that bill, for want of equity, was allowed. The order allowing the demurrer was appealed against in

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1846, and in the appeal the original decree was expressly complained of. In July, 1847, there was a general dismissal of the appeal, and the order allowing the demurrer was specially mentioned in the order of dismissal, but the original decree was not mentioned. In 1848 there was a petition for leave to appeal against the original decree and certain other orders made in the course of the proceedings, but which had not then been enrolled, and in the petition it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and therefore that their Lordships had not made any declaration with respect to it," and that "the said decree had never been adjudicated upon by their Lordships." On this petition, and after other proceedings taken, leave was given to include in the appeal the decree of January, 1835. The appeal was heard *ex parte*, and in June 1850, the decree was reversed:

Held, that this reversal had been obtained by suppression and misrepresentation, and the parties affected by it having petitioned for relief, the House discharged the order, giving leave to appeal against the decree of January, 1835, and the order which had reversed that decree. No costs were given.—*Ex parte White v. Tommney*, 4 H. L. Cas. 313.

155. *Discretion of Court Below—Married Woman*.—It is a matter of discretion for the Court of Chancery whether it will or will not interfere by *interim* order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned.—*Owen v. Homan*, 4 H. L. Cas. 997.

When a married woman, having separate estate, is a party to a suit, the interference will be accorded or refused according to the circumstances of the case.—*Id.*

Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an

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objection to the proposed interference.—*Owen v. Homan*, 4 H. L. Cas. 997.

An objection in respect of parties to an appeal must be taken before the Appeal Committee.—*Id.*

156. *Points properly Raised.*—On the hearing of a cause, in which the question for decision depended on the form of the pleadings, and the House was of opinion that the pleadings would not allow the question to be properly decided, time was given, after argument, to allow an arrangement between the parties, by which the pleadings might be altered for that purpose.—*Bristol (Marquis) v. Robinson*, 4 H. L. Cas. 1088.

157. *Delay in Hearing.*—The House will refuse to allow a cause to stand over indefinitely, though upon an understanding that the appeal is to be compromised, but will require it to be proceeded with in its regular turn, or to be withdrawn.—*Mayor of London v. Combe*, 4 H. L. Cas. 1089.

158. *Decision of this House—Costs.*—A decision of this House when once pronounced in a particular case, is conclusive in that case, and cannot be reversed except by Act of Parliament; but if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle.—*Wilson v. Wilson*, 5 H. L. Cas. 40.

One part of a decree was held to be sufficiently doubtful to justify an appeal against it, but as to another part of the same decree, the appellant having sought to obtain a construction of articles of agreement which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs.—*Id.*

159. *Form of Entries on the Record—Postea, &c.*—On the trial in *Dublin*, of an action between *A.* and *B.*, the judge gave certain directions to the jury, to which *A.* objected; he tendered a bill of exceptions, which (according to the provisions of the *Irish* statute, 28 *Geo. 3*, c. 31) was duly signed

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by the judge, and was afterwards argued in the Court in which the action was brought. That Court adopted the exceptions, and ordered a *venire de novo*, and a new trial took place, the Court deciding that such was the proper course. *B.* did not appear at the second trial. On the first trial, the verdict had been given for *B.*; on the second it was given for *A.*, and judgment was pronounced thereon in his favour; *B.* brought a writ of error, and then, finding that the *postea* and all the proceedings relating to the first trial had been struck out of the record, which from the first *venire* went on, with formal continuances only, to the second trial and verdict, he applied to the Court in which the action was brought, to have these omissions supplied. That Court refused to supply them:

Held, that this mode of proceeding was erroneous, and this House ordered the Court in which the action was brought to amend the record, by entering on the plea roll the first trial, the exceptions, and the award of a *venire de novo*.—*Bank of Ireland v. Evans' Trustees*, 5 H. L. Cas. 389.

Held, also, that *B.* was not bound to appear at the second trial.—*Id.*

160. *Notice of Injunction.*—*Quære*, whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is an agent merely for the sale of the goods of the principal?—*Corron Company v. Maclaren*, 5 H. L. Cas. 416.

Service of notice on one member of a corporation is sufficient.—*Id.*

161. *Interest—Master's Reports—Costs.*—A suit to administer a will was instituted in 1800; a great many delays had taken place; it is a rule of equity to give interest, where there has been unnecessary and vexatious delay; but as the House could not attribute the delays in this case to any particular party in the suit, no interest was allowed.—*Torre v. Broune*, 5 H. L. Cas. 556.

A party is not prevented from appealing against a decree, because he did

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not except to the Master's report on which it is founded. — *Torre v. Browne*, 5 H. L. Cas. 555.

Where a part of a decree was sustained and part reversed, no costs were given.—*Id.*

162. *Mortgage—Surplus*.—The holders of a registered judgment may maintain a bill against a mortgagee of the estate of the judgment debtor, if, upon a sale of the debtor's estate, the mortgagee after satisfying the mortgage debt, has still a surplus in his hands.—*Lane v. Horlock*, 5 H. L. Cas. 580.

The House does not reform a decree of the Court below.—*Id.*

163. *Appellant—Privilege*. — Though an appellant comes to *London* long before it is necessary to do so in order to attend the hearing of his cause, so that if then arrested he would not be discharged, yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody.—*Perse v. Perse*, 5 H. L. Cas. 671.

164. *Heir—Will*.—A bill to establish a will against an heir-at-law may be maintained at the suit of a mere legal devisee not charged with any duty or trust under the will.—*Colclough v. Boyne*, 6 H. L. Cas. 1.

165. *Heir—Will—Married Women*.—In a bill filed by an heir-at-law to impeach a will of real estate as having been obtained by undue influence or fraud, the Court of Chancery has a discretion to direct an issue *devisavit vel non*, or merely to remove obstacles out of the way of the heir asserting his legal title. This House will not interfere with the exercise of that discretion, unless it appears that injustice has been or is likely to be its consequence.—*Boyse v. Rossborough*, 6 H. L. Cas. 2.

Whether in a trial at law ordered by the Court of Equity, there has or has not been misdirection, equity is not bound by one verdict, but for its better satisfaction may direct a new trial.—*Id.*

Quære, whether a consent to a particular form of order can be given by a married woman?—*Id.*

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Though during her husband's life, and after his death, she acted upon that order, she was allowed to make it one of the grounds of appeal to this House.—*Boyse v. Rossborough*, 6 H. L. Cas. 2.

A suit was instituted against a married woman and her husband in respect of property devised to her. After a decree, which among other things directed an account, the Master reported a sum as due from both. An order was made on the widow to pay this sum into Court within a limited time. This sum was composed of rents received from the property in dispute, before and during the marriage, and after the death of the husband.—*Id.*

Quære, whether such an order could be, under such circumstances, valid?—*Id.*

166. *Creditors—Assets*.—A petition of certain persons under the 33 *Geo. 2*, c. 14 (*Ir.*), on behalf of themselves and all the creditors of an *Irish* bank, for administration of assets, under the trusts of that statute, is informal. It ought to be a petition on behalf of all the creditors of the persons constituting the bank.—*O'Flaherty v. Macdowell*, 6 H. L. Cas. 142.

(*Fawcett v. Hodges*, 3 *Ir. Eq. Rep.* 232, overruled; *Hayden v. Carroll*, 3 *Ridg. Parl. Cas.* 545, questioned).—*Id.*

167. *Appeal*.—A disallowance of the Master of a claim made under the Winding-up Acts, is the subject of an appeal.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

168. *Amending Power—Eat Sine Die*.—A declaration contained two breaches. The defendant pleaded not guilty on the first breach, which involved the whole cause of action. The finding was for the plaintiff, and the damages were assessed thereon, and judgment was entered up on that finding. On the second breach there was a finding of not guilty. No entry of *eat sine die* was made on this finding:

Held, that there should have been such an entry, but that this House had power to amend the record, by directing such an entry to be made.—*Hooper v. Lane*, 6 H. L. Cas. 443.

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Quere, whether where a judgment of the Court below is affirmed on error, and interest is asked for under the 3 & 4 Will. 4, c. 42, this House need make the order for interest, or may leave the party to apply for it in the Court below?—*Hooper v. Lane*, 6 H. L. Cas. 443.

169. *Order to Replace Money*.—In a case in which the question arose under a will whether a deficiency of a sum to realise an income secured by the will to the widow, was to be made good out of the *corpus* of the estate, a portion of the fund itself had, under the order of the Court below, been sold to make good the deficiency; the House, on reversing the order, directed the widow to replace that portion.—*Baker v. Baker*, 6 H. L. Cas. 616.

170. *Parties—Form—Dismissal of Bill*.—Certain parties held different characters, and a suit was instituted against them, not quite in regular form, but they were all before the Court; an order had been made directing an inquiry and report, and the inquiry had taken place, and the report had been made; and the report was confirmed on farther directions. An appeal was then brought:

Held, that a Court of Equity, seeing that all the parties really interested were before it, would not, especially after an inquiry and report, dismiss the bill for matter of form.—*Durroves v. Gore*, 6 H. L. Cas. 907.

171. *Peerage — Handwriting — Attorney General*.—A. claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct would be entitled to the estate, but who alleged that their title would be defeated if the claim to the peerage should be established, were allowed to appear, and be heard in opposition to the claim.—*Shrewsbury Peerage*, 7 H. L. Cas. 1.

When the Legislature has directed that a particular rule as to evidence shall be adopted "in every court of civil judicature," though those words do not include a Committee for Privileges, such Committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 Vict.

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c. 125, s. 27, which permits in all courts of civil judicature comparison of handwriting as a means of evidence, was therefore adopted by the Committee.—*Shrewsbury Peerage*, 7 H. L. Cas. 1.

If a party is admitted to oppose a claim of peerage, he must make his opening statement after the claimant's evidence has been closed, whether the claimant's counsel sums up or not.—*Id.*

A barrister who had attended as counsel for the claimant of a peerage during the whole of one session, was, at the commencement of the next, appointed Attorney General. The Committee for Privileges allowed him to continue to act as counsel for the claimant, and accepted the Solicitor General as his representative on the part of the Crown.—*Id.*

172. *Trustees' Accounts.—Objection to part of a Decree—Cross Appeal*.—Trustees entered into possession of rents and profits and paid them over under a trust deed to a married woman to her separate use; it afterwards appeared that she was not entitled to receive them, but that upon the true construction of a will they ought to have gone to another person. That person filed a bill, and a decree was made in his favour, but an account of the rents and profits was only ordered from the date of the filing of the bill:

Held, that whether an account should be directed from the filing of the bill, or from an anterior time, is a matter of discretion, and that in this case the discretion had been rightly exercised.—*Vernon v. Wright*, 7 H. L. Cas. 35.

The respondent was allowed to object to a part of the decree, though he had not brought any cross appeal.—*Id.*

173. *Two Appeals—Costs*.—Two appeals in the same interest, and raising the same point, were presented. One set of appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will yet, as there had been two separate

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appeals when one would have been sufficient, the House refused to make any order as to costs.—*Ricketts v. Carpenter*, 7 H. L. Cas. 68.

174. *Grounds of Nonsuit*.—After a verdict for a plaintiff, a rule to enter a nonsuit was obtained, and the grounds were stated to be "that the goods lost or damaged were received and carried by the defendants under a contract, by the conditions of which the defendants were not liable for loss or damage by fire." A judgment was given, which was reversed in the Exchequer Chamber, and the case was brought up to this House:

Held, that it was competent to the defendants, on the hearing of the case here, to discuss the question, whether any contract whatever existed as between them and the plaintiff.—*Bristol and Exeter Directors, &c. v. Collins*, 7 H. L. Cas. 194.

175. *Fund in Court*.—A Court of Equity may, by additional orders, without a bill of review, or a re-hearing, deal with a fund which is still in Court.—*Montefiore v. Browne*, 7 H. L. Cas. 241.

But where the party so requiring the Court to deal with the fund might have appeared at an earlier stage of the cause, he will be required to pay all the additional costs which have been occasioned by the imperfect manner in which his claim was brought forward.—*Id.*

176. *Time of Appeal*.—The time for appealing to this House against a decree or order of the Court of Chancery in *Ireland* is still, notwithstanding the 13 & 14 Vict. c. 89, s. 30, to be calculated from the time of the enrolment of that decree or order, and not from the day when it was pronounced in Court.—*Lambert v. Peyton*, 7 H. L. Cas. 423.

177. *Decision of this House Final—Counsel—Judge*.—The House will not reconsider a question which it has once decided.—*Thellusson v. Rendlesham*, 7 H. L. Cas. 429.

A counsel in a cause, being afterwards

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raised to the Bench, is not thereby precluded from taking part in the hearing and discussion of that cause, but he may properly (unless his doing so would entail great inconvenience and expense on the parties, or perhaps from his being, as in Chancery, the sole judge of the Court, amount to a denial of justice) decline to take part in such hearing and decision.—*Thellusson v. Rendlesham*, 7 H. L. Cas. 429.

A will was impeached as being void for uncertainty, and its construction was likewise contested. The Court below sustained its validity, and put a construction on it. The next of kin appealed on the first point. Two persons claiming to be devisees appealed on the second; all the parties appeared by different counsel. As their interests were the same, only one counsel was heard for each of the appealing devisees, and only one for each of the respondents: the counsel for the next of kin were then heard, and were answered in like manner by one of the counsel of each respondent. One of the appellant's counsel had then the general reply.—*Id.*

178. *Form of Decree—Competency—Costs*.—A decree directed a conveyance, but did not, in form, declare the rights of the parties:

Held, that this was defective.—*Lambert v. Peyton*, 8 H. L. Cas. 1.

There had been an objection to the competency of the appeal. The Appeal Committee directed that objection to be heard before the House. The question of competency was decided in favour of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The costs incurred by the objection to the competency of the appeal, were directed to be deducted from the general costs.—*Id.*

179. *Justification for Suit*.—A deed which incorrectly recites the consideration for a contract, on which a conveyance was executed, does not thereby warrant a suit to set aside the contract, but only to re-form the con-

PRACTICE—continued.

veyance.—*Harrison v. Guest*, 8 H. L. Cas. 481.

180. *Signing and Enrolling Decree*—What an Appeal brings up.—Signing and enrolling decrees in the Court of Chancery are acts in a suit. They are parts of the procedure of the Court, and may therefore, by virtue of its inherent power, be regulated by the orders of the Court. They may be so, though an order limiting the period for enrolment may indirectly affect the power of a suitor to appeal against a decree.—*Beavan v. Countess of Mornington*, 8 H. L. Cas. 525.

Where a decree in one suit has been acquiesced in for more than five years, and the time for enrolling it has been allowed to go by, so that it cannot be enrolled except by leave of the Court, the fact that a decree of an opposite kind has been pronounced in another suit arising out of the same circumstances (but pending between different parties), does not afford a ground for enlarging the time for enrolling the decree in the first suit, so as to enable the party against whom it was pronounced to appeal to this House.—*Id.*

An appeal against an order on farther directions, will not have the effect of bringing up the decree which it merely carries into effect.—*Id.*

The rule in *De Burgh v. Clarke* (4 Cl. & F. 562), and *Attwood v. Small* (6 Cl. & F. 232, 309), applies only to an appeal against a final decree having the effect of bringing up the previous interlocutory orders.—*Id.*

181. *Power to Grant New Trial*—On a trial for the infringement of a patent, the judge declared his opinion that the specification and disclaimer were sufficient to sustain the patent, but he reserved that question for the Court. A verdict was given for the plaintiff. A rule to enter the verdict for the defendant was obtained, but was discharged. Leave to appeal was granted under the 17 & 18 Vict. c. 125, and the Court added to the leave, "and also on the ground that, taking the specification

PRACTICE—continued.

and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the Court below. The Court of Exchequer Chamber affirmed the judgment of the Court below on the question of the sufficiency of the specification and disclaimer, but directed a new trial on the ground that there was no evidence of infringement to go to the jury:

Held, that the Court of Exchequer Chamber had authority to grant a new trial.—*Seed v. Higgins*, 8 H. L. Cas. 550.

182. *Venire de Novo*. — *Quare*, whether, where a judgment had been entered for the plaintiff in the Court below, and this House was of opinion that the action, as brought, was not maintainable, it had power to do more (except by consent) than to reverse the judgment, and order a *venire de novo*?—*Young v. Billiter*, 8 H. L. Cas. 682.

183. *Ground of Judgment*.—In the Court of Queen's Bench, in an action on an agreement, the questions discussed were—one of fact, what the parties had said and written to each other, and one of law, what was the construction to be put on two letters of the defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon proceeding by appeal under the Common Law Procedure Act), the judgment of the Court was given on the ground that even if the defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds:

Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment.—*Fitzmaurice v. Bayley*, 9 H. L. Cas. 78.

184. *Costs*. — The Lords differing in opinion, no costs were given.—*Monypenny v. Monypenny*, 9 H. L. Cas. 114.

But see *Hopkinson v. Rolt*, 9 H. L. Cas. 555.

PRACTICE—continued.

185. *Costs*.—The appellant's counsel appeared and announced that he could not distinguish his case from one which had been recently decided, and therefore submitted to an affirmance. The appeal was dismissed with costs.—*Monypenny v. Dering*, 9 H. L. Cas. 149 n.

186. *Change of Venue—Suggestion—Waiver of Objection*.—In an information in the nature of a *quo warranto*, there was, after issue joined, a suggestion entered on the record "that the trial of the issue may be more conveniently had" in *M.* than in *L.* The defendant appeared at the trial in *M.*:

Held, that for the purpose of securing a fair trial, the Court has an inherent power to change the venue; that if this form of suggestion was insufficient, it should have been demurred to; that the defendant had here waived all objection to it by appearing at the trial, and that it was no ground of error.—*Clerk v. The Queen*, 9 H. L. Cas. 184.

187. *Dismissal*.—Where an appellant does not appear to support his appeal, it may, on the application of the respondent, be dismissed, with costs.—*Smith v. Durant*, 9 H. L. Cas. 192.

188. *Remit to Proceed*.—The Vice Chancellor made a decree, which was afterwards varied by the Lords Justices. This House restored the decree of the Vice Chancellor, and farther proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the Lords Justices.—*Stockton Railway Company v. Brown*, 9 H. L. Cas. 246.

189. *Chancery—Issue*.—Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole attesting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation; the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine,

PRACTICE—continued.

does not call on that Court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.—*Newton v. Ricketts*, 9 H. L. Cas. 262.

190. *Per Lord Campbell* (Lord Chancellor): A decision of this House, occasioned by the Lords being equally divided, is as binding upon this House itself and upon all inferior courts, as if it had been pronounced *nemine dissente*. (See *The Attorney General v. The Dean of Windsor*, ante, vol. 8, p. 369.)—*Beamish v. Beamish*, 9 H. L. Cas. 274.

191. *Costs*.—Though the Lords differed in opinion, costs were given on an affirmance.—*Hopkinson v. Rolt*, 9 H. L. Cas. 555.

192. *Barrister*.—A barrister, who is a party to an appeal case, must elect to conduct his own case, or to have it conducted by counsel.—*New Brunswick, &c. Company v. Conybeare*, 9 H. L. Cas. 711.

193. *Trust—Defective Appeal*.—Trustees of a bank filed a bill against their solicitor for a breach of trust in his character of solicitor. To the bill impeaching a particular transaction, *R.* had been made a defendant. The Court below dismissed the bill as to him. This was erroneous, but no appeal having been lodged against this part of the decree, no order could be made upon it.—*Tyrrell v. The Bank of London*, 10 H. L. Cas. 26.

194. *Fraud—Accounts*.—A mortgagee who had been, by fraud, induced to release his mortgage, was declared entitled, notwithstanding the release, to retain the benefit of the mortgage, but it was directed at the same time that the securities, which he had received as the consideration for releasing his mortgage, if they should prove to be worth anything, should be taken into consideration in the accounts.—*Eyre v. Burmester*, 10 H. L. Cas. 90.

195. *Will—Construction—Heir-at-Law*.—Two persons contested the construction of a particular devise. The heir-at-law did not appear in the

PRACTICE—continued.

Court below, nor in this House. In pronouncing the decision here, it was declared that that decision must be considered as pronounced without prejudice to any rights which the heir-at-law might claim to possess, —*Atkinson v. Holby*, 10 H. L. Cas. 313.

196. *Form of Injunction*.—An injunction granted to restrain a mine owner from so working mines as to take away the adjacent support to which a railway company is entitled, is not required to state the precise limits within which such mines may be worked.—*Elliot v. The North Eastern Railway Company*, 10 H. L. Cas. 333.

197. *Partial Correction of Order of Court Below*.—An order made in the Court below respecting the disposition of residuary estate, was approved of by the House, but that order having directed the laying out of intermediate income till a certain event should happen, and the happening of such event being possibly beyond the period limited by the law against accumulation, the House in confirming the order generally, corrected it in that particular respect.—*Bective (Countess) v. Hodgson*, 10 H. L. Cas. 656.

Where there is an appeal against a part of a decree, and the notice of appeal has been served on all parties, the House will not make a partial order, so as to enable those who did not join in the appeal to bring another.—*Id.*

198. *Delay—Sale and Transfer of Land (Ir.) Act*.—Where a sale and re-sale of an estate made under the 21 & 22 Vict. c. 72, had been made in an irregular manner, but had not been appealed against before the conveyance was executed :

Held, that this House was precluded from affording the appellant relief against the consequences of these irregularities.—*Power v. Reeves*, 10 H. L. Cas. 645.

199. *Divorce—Trial*.—Where, by consent, on the trial of a petition for a di-

PRACTICE—continued.

vorice, a jury has been dispensed with, if a new trial should be ordered, the consent previously given would no longer be binding, and the petitioner might demand to have his case tried before a jury.—*Gipps v. Gipps*, 11 H. L. Cas. 1.

200. *Trade Mark*.—Where an advertisement or trade mark states that which is not true, it cannot be made the subject of protection by the Court of Chancery.—*Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523.

201. *Powers of Appeal—Committee—Costs*.—The Appeal Committee cannot decide what documents are, and what are not, necessary to be printed in the Appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The House would not afterwards hear it discussed, and refused to make any order as to the costs of the Appendix.—*Spread v. Morgan*, 11 H. L. Cas. 588.

The decision being reversed, and the cause remitted, the Court below was left to deal with the general question of costs.—*Id.*

PREBEND. See ADVOWSON.

The 28 Hen. 8, c. 11, s. 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, afferring or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Will. 4, c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute, the

PREBEND—continued.

Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action of money had and received to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend."

Held, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebendary, he was a member.—*Repton v. Hodgson*, 3 H. L. Cas. 72.

PRECEDENCE.

The Attorney General of England has precedence over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of the House.—*Attorney General v. Lord Advocate*, 2 Cl. & F. 481.

PRECEPT OF SASIN. See PRACTICE.**PREROGATIVE.** See ATTORNEY GENERAL. CHARITY. CROWN. FISHERY.**PRESBYTERY.** See CHURCH. GLEBE. MANSE.

1. On the refusal by the heritors of a parish to take the proper steps to rebuild the parish church, found by the Presbytery to be ruinous, the members of the Presbytery themselves advertise for and adopt a plan and estimates, and contract for the rebuilding, and assess the heritors for the principal sums, but neglect to assess some feuars of a part of a small village included in the parish.

PRESBYTERY—continued.

The heritors assessed present a bill of suspension, on the ground of irregularity in the proceedings of the Presbytery, but all objection is abandoned as to the jurisdiction of that body in assessing the heritors, in case of their refusal to assess themselves. The suspension was refused by the Court of Session, and the refusal affirmed by this House.—*Maxwell v. Gordon*, 4 Dow, 279.

2. The statute 10 Anne, c. 12, establishes the civil rights of patronage in the Church of Scotland, and the General Assembly of that church has no authority to make any laws or regulations which may prevent the exercise of those rights.—*Presbytery of Auchterarder v. Kinnoul (Earl)*, 6 Cl. & F. 646.

Where, therefore, the Assembly had made an interim Act authorising the Presbytery of any parish, in certain cases, to refuse to a presentee his trials, and to reject him without them, the patron had a right to proceed by suit in the Court of Session against such Presbytery.—*Presbytery of Auchterarder v. Kinnoul (Earl)*, 6 Cl. & F. 646.

3. The presentee is also entitled in such a case to maintain an action for damages.—*Ferguson v. Kinnoul (Earl) and Young*, 9 Cl. & F. 251.

PRESCRIPTION. See LIGHTS. LIMITATIONS. TITHES.

1. The English statute, 31 *Elis.* c. 5, prescribes a limit within which "actions, &c., upon any statute penal" must be brought. The British statute, 12 Anne, c. 2, s. 16, was passed to restrain usurious contracts:

Held, that the limitations in the statute of *Elis.* must be understood as incorporated in the statute of Anne, and so applied to Scotland as well as England.—*Surtees v. Allan*, 2 Dow, 254.

2. Where a creditor of a firm in India died there before his right of action

PRESCRIPTION—continued.

was barred by lapse of time, and his personal representatives in *Scotland* brought an action there against a partner of the firm, 23 years after the creditor's death :

Held, that the *English* Statute of Limitations did not take effect, the action having been brought within six years after *English* probate or letters of administration were taken out to the deceased creditor.—*Ferguson v. Fyffe*, 8 Cl. & F. 121

3. Length of time is no bar to a claim to a dignity; yet the absence of assertion of right by many persons may raise a presumption against their descendants, unless satisfactorily accounted for.—*Hastings Peerage*, 8 Cl. & F. 144.

4. Under the Act 2 & 3 Will. 4, c. 71, ss. 3 and 4, a party is prescriptively entitled to the access and use of light, if his enjoyment thereof commenced 20 years next before the the bringing of an action in which the right is contested; provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in for a whole year.

Accordingly, where *A.* had the free access of light and air through a window of his house for 19 years and 330 days, and *B.* then raised a wall which obstructed the light, and the obstruction was submitted to only for 35 days, when *A.* brought an action to remove it :

Held, that the right of action was complete; that the 20 years' enjoyment was to be reckoned from the commencement of the enjoyment to the time of bringing the action; and that an interruption of the enjoyment in whatever period of the 20 years it may happen, cannot be deemed an interruption within the meaning of the Act, unless it is acquiesced in for a whole year.—*Flight v. Thomas*, 8 Cl. & F. 231.

5. The right to ancient lights now depends on statute (2 & 3 Will. 4, c. 21), and does not require, and ought not to be rested on, any prescription or fiction of a license.—*Tapling v. Jones*, 11 H. L. Cas. 290.

PRESENTATION. See ADVOWSON. PRESBYTERY.

PRESUMPTION. See LIMITATIONS, STATUTE OF.

1. There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered.—*Lapsley v. Grierson*, 1 H. L. Cas. 498.

2. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.—*Piers v. Piers*, 2 H. L. Cas. 331.

3. There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.—*Wing v. Angrave*, 8 H. L. Cas. 183.

Nor is there any presumption of law that all died at the same time.—*Id.*

The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative.—*Id.*

Two persons, husband and wife, made their separate wills. In the husband's will the property was given to his wife, "and in case my wife shall die in my lifetime," then to *W. W.*, in trust for the children on their coming of age, and in case all of them should die under age, then to *W. W.* for his absolute use and benefit. In the wife's will (made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named) the property was given to the husband (subject to interests in the children), "and in case my husband should die in my lifetime," then to *W. W.* absolutely.

PRESUMPTION—continued.

Husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together :

Held, that there was no presumption that the husband had survived the wife, or the wife the husband.—*Wing v. Angrave*, 8 H. L. Cas. 183.

Held also (Lord Campbell, Lord Chancellor, *diss.*), that on the true construction of the wills, it was necessary for *W. W.* to show affirmatively that one or other had survived, and that in the absence of such proof, the property went to the relatives specifically named in the will of the wife's father, as if there had been no will by the husband, nor any appointment by the wife.—*Id.*

Held likewise (Lord Campbell, Lord Chancellor, *diss.*), that the union of the characters of legatee under the husband's will, and appointee under the wife's will, did not place *W. W.* in a situation of greater advantage than if the two characters had been held by different persons.—*Id.*

4. *Per Lord Chelmsford* : There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired. *Armory v. Delemirie* (Strange, 505) does not apply to such a case.—*Wentworth v. Lloyd*, 10 H. L. Cas. 589.

PRINCIPAL AND AGENT. See ATTORNEY AND CLIENT. FRAUD. INSURANCE. SHIP.

1. Certain persons carried on business as bankers at *Brechin*; they were also the general agents for the bank of *Scotland* at that place. *W.* deposited with them a sum of money, intending to deposit it on his own account with the bank of *Scotland*. He received an acknowledgment headed "Bank Office, *Brechin*," and signed by the names of the persons who were both private bankers and general agents for the bank of *Scotland* :

Held, that he could not, on this note, recover the deposit from the bank

PRINCIPAL AND AGENT—continued.

of *Scotland*.—*The Governor, &c. of the Bank of Scotland v. Watson*, 31 Dow, 40.

See *Trueman v. Loder*, 11 Ad. & E. 589.

2. A person employed as a gentleman's general law agent in purchasing lands, making payments, in conveying, and expediting titles, receives, on behalf of his employer, the rents of a small detached property, let to inferior tenants, without any written commission as factor, and under circumstances which showed that it was not expected that he should compel payments of the rents by ultimate diligence, as in the case of a country factor, though he charged fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original employer calls upon the agent for payment of the amount of the rents lost during the time of his management, by such insolvency; as he might have compelled payment by incarceration, sequestration, and a roup of effects, but had neglected to do so :

Held, by the House of Lords, affirming a decision of the Court of Session, that under the particular circumstances of the case, the agent was not liable for the rents so lost.—*Macdowal v. Buchan*, 5 Dow, 127 (1st note).

But the agent having been called upon by his employer for a general account, and not having kept his accounts in such a state that they could be readily produced, and the delay having been the immediate cause of bringing an action for an account, though the sum justly due was less than the sum claimed, and the decision below in favour of the agent was affirmed above, it was so affirmed without costs.—*Id.*

3. Where a person placed himself under the advice of a dealer in *English* and foreign funds, and the latter advised purchases and sales of stock, and it afterwards appeared that these purchases and sales were merely nominal transfers and re-transfers of

PRINCIPAL AND AGENT—*continued.*

the dealers own stock, the difference being settled in account; it was held that the Court of Equity rightly interfered to compel an account between the parties, and to set aside the transactions that had taken place, on the ground that the dealer stood in a situation of advantage which equity will not allow to an agent in dealing with his principal.—*Rothschild v. Brookman*, 2 Dow & C. 188.

4. A trustee and executor, who had been land agent and receiver to his testator, without settling accounts for several years, upon his death obtained from the *cestui que* trust and residuary legatee an agreement to continue him in the agency, and in case of removal without just cause, to allow him the same salary; and also a deed granting to him part of the trust estate. The agreement and the deed were prepared by the agent, who was an attorney, and executed by the principal and *cestui que* trust without legal advice; and the deed recited, untruly, that it was granted "by last request of the testator, in consideration of the agent's services," and also in full discharge of all accounts between them. The new agency terminated in a year and a half, by mutual desire of the parties; and after a settlement of accounts to the satisfaction of the principal's legal advisers, he executed a deed approved of by them, confirming the former deed, and subsequently wrote letters to the agent, claiming the benefit of the latter deed, and expressing his satisfaction at having given the estate :

Held (affirming the decree of the Court below, dismissing a bill filed to set aside both deeds, and to take the executorship and other accounts), that although the deed of gift was voidable in its origin, and could not be sustained if it stood by itself, and had been impeached in reasonable time yet that the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid.—*De Montmorency v. Devereux*, 7 Cl. & F. 188.

It is to be assumed that legal advisers, in discharge of their duty to their clients, investigate suspicious trans-

PRINCIPAL AND AGENT—*continued.*

actions, and satisfy themselves, before they approve them, that it is for the client's benefit to confirm them.—*De Montmorency v. Devereux*, 7 Cl. & F. 188.

Where a transaction, of a suspicious nature in its commencement can only be sustained by subsequent acts of confirmation, the party so sustaining it must pay his own costs of the investigation into the circumstances.—*Id.*

5. The appointment, by trustees, of one of their number to be factor to the trust estate, would not of itself make them liable for his defaults; but by so making him their agent they would be liable for his defaults as agent, and not as co-trustee, in the same way that they would be liable for the defaults of any other person whom they might appoint to the office. The principle of the rule is the same in *Scotland* as in *England*.—*Horne v. Pringle*, 8 Cl. & F. 264.
6. In construing an agreement in the form of a bond, in which a surety becomes liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency :
Held, accordingly (affirming the judgment of the Court of Session), that monies received by an agent on account of his employers during the time of his agency, but not in pursuance of the particular agency disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation, "that during the whole time the said J. D. B. (the agent) shall continue to act as agent aforesaid, in consequence of the above recited agreement, he shall well and truly account for and pay to us (the employers), all sums of money received by him on our account."—*Napier v. Bruce*, 8 Cl. & F. 470.
7. *M.* employed *R. & Co.*, bankers in *Edinburgh*, to obtain for him payment of a bill drawn on a person resident at *Calcutta*. *R. & Co.* ac-

PRINCIPAL AND AGENT—*continued*.

cepted the employment, and wrote promising to credit him with the money when received. *R. & Co.* transmitted the bill in the usual course of business to *C. & Co.* of *London*, and by them it was forwarded to *India*, where it was duly paid. *R. & Co.* wrote to *M.* announcing the fact of its payment, but never actually credited him in their books with the amount. The house in *India* failed :

Held, that *R. & Co.* were the agents of *M.* to obtain payment of the bill ; that payment having been actually made, they became *ipso facto* liable to him for the amount received ; and that he was not called upon to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed. — *Mackery v. Ramsays*, 9 Cl. & F. 818.

8. The 6 & 7 *Will. 4*, c. 115 (extended by the 3 & 4 *Vict.* c. 31), authorises exchanges of lands on conditions therein prescribed. One of these is the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to carry this Act into execution, and appointed a commissioner for that purpose. *B.*, one of the landowners, authorised his agent to attend for him at the meetings held for the purpose of carrying the Act into execution, but desired him not to exchange a particular wood except for woodland. *N.*'s lands were to be exchanged against those of *B.*, and this restriction was communicated to *N.*'s agent, who being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to *B.*, who took no farther notice of the matter. The restriction on the authority of *B.*'s agent, did not appear to have been brought to the knowledge of the commissioner. The commissioner prepared, and *B.* signed a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated, was the wood in question ; but the number by which

PRINCIPAL AND AGENT—*continued*.

it was referred to in the consent, and in a map and plan previously submitted to *B.*'s inspection, was not the same as that which it bore in *B.*'s private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioner's map, would have shown *B.* that the wood in question was included in the consent. The commissioner allotted the lands to be exchanged, and among them, included this wood, but did not give woodland for it. Possession of the exchanged lands, and of this wood (although the award of the commissioner had not been formally executed), was delivered by *B.*'s agent to *N.*, who immediately began to exercise acts of ownership over it. *B.*, some time afterwards, discovered what had been done, and brought ejectment against *N.* for the wood. *N.* filed his bill in Chancery to restrain *B.* from proceeding with the action, and to compel him to perfect the exchange, and *B.* filed his bill to prevent the commissioner from executing the award, alleging that the consent given to him had been signed in mistake :

Held, that *N.* was entitled to an injunction, as prayed by his bill, and that *B.* had no equity on which to ask for the interference of the Court in his favour. — *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248.

See *Squire v. Whitton*, 1 H. L. Cas. 333 ; *Ridgway v. Wharton*, 6 H. L. Cas. 252 ; *Darnley v. London, Chatham, and Dover Railway*, L. R., 2 H. L., 48.

9. The law agent of a joint-stock company is not its agent to bind it by representations as to its condition and circumstances ; nor, though a shareholder in it, can he bind it as a partner, for a joint-stock company is not like an ordinary partnership, bound by the act of an individual member. — *Burnes v. Pennell*, 2 H. L. Cas. 497.

See *Bain v. Whitehaven Railway*, 3 H. L. Cas. 1 ; *Bargate v. Shortridge*, 5 H. L. Cas. 297 ; *Carron Company v. Maclaren*, 5 H. L. Cas. 416 ; *New Brunswick and Land Company v. Conybeare*, 9 H. L. Cas.

PRINCIPAL AND AGENT—*continued*.

722; *Venezuela Railway Company v. Kisch*, L. R., 2 H. L., 111; *Ex parte Oakes v. Peek*, L. R., 2 H. L., 339.

10. The agent and manager of the business of a *London* firm, who resided in *Sweden*, gave to a merchant there about to draw bills on that firm an assurance that the bills would be accepted; whereon bills of lading of cargoes of timber were transmitted to the *London* firm, and bills of exchange were drawn against them:

Held, that this assurance, though thus made and acted on, was not as between the *London* firm and the foreign merchants to be treated as equivalent to an acceptance of the bills, so as to vest in the *London* firm legal rights from the time of such assurance given. — *Hoare v. Dresser*, 7 H. L. Cas. 290.

PRIORITY. *See* MORTGAGE. REGISTRATION.

1. A second incumbrancer of an equitable interest, by giving notice of his incumbrance to the trustees in whom is vested the legal estate, obtains priority over a previous incumbrancer who has not given such notice. — *Foster v. Cockerell*, 3 Cl. & F. 456.

See *Lloyd v. Banks*, L. R., 4 Eq., 223.

2. The owner of an estate in fee in *Scotland*, granted heritable bonds over it for payment of debts, and subsequently by deed conveyed the estate to his eldest son, farther burdening it with annuities for younger children. The eldest son, after coming into possession of the estate, granted a bond and disposition over it for securing payment of a loan, the lender taking as collateral security, assignations of the prior heritable bonds from the borrower's trustee, to whom they had assigned absolutely; but whether they were paid out of the borrower's funds or out of the loan, was not proved:

Held, that the representatives of the lender were entitled to be preferred for payment out of the estate, before the younger children and mean

PRIORITY—*continued*.

incumbrancers; and that they had a right to apply interest paid on the loan in discharge of arrears of interest due on the prior incumbrances, there being no appropriation of the payment. — *Mackenzie v. Gordon*, 6 Cl. & F. 875.

3. A testator gave his wife his freehold estate of *B.*, and certain specific chattels; and also an annuity for her life charged upon all his real estates (except *B.*), with power of distress for the same; the first payment thereof to be made on the 1st of May or November, which should first happen after his decease. He then charged his debts upon his real estates (except *B.*) in aid of his personal estate; and gave an annuity to his sister in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces and others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate; and in deficiency thereof to be raised and paid by them as they should think proper, out of his real estates (except *B.*), and he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities. The personal estate was insufficient to pay the debts and legacies. The real estate was insufficient to pay the annuities and legacies:

Held, upon the true construction of the provisions of the will, that, as to the real estate, the annuities were entitled to priority over the legacies. — *Creed v. Creed*, 11 Cl. & F. 491.

See *Conron v. Conron*, 7 H. L. Cas. 177; *Sugd. Law of Property*, 428.

PRIVACY.

Invasion of privacy by opening a window which overlooks another man's grounds, is not recognised by law as a wrongful act. — *Tapling v. Jones*, 11 H. L. Cas. 290.

PRIVATE ACTS OF PARLIAMENT.

1. A party interested in the subject matter of a private Act of Parliament will have his rights affected by

PRIVATE ACTS OF PARLIAMENT—continued.

its provisions, though it may have been introduced and passed without notice duly given to him.—*Edinburgh Railway Company v. Wauchope*, 8 Cl. & F. 710.

See *Moody v. Corbett*, L. R., 1 Q. B., 517; *Lang v. Purves*, 15 Moo. P. C. 419.

2. Recitals in private Acts of Parliament were, in the *Wharton Peerage case*, 12 Cl. & F. 225–302 (1835), held to be admissible as proof of relationship in peerage cases, on the ground that, up to that time, statements of that kind were not allowed to be inserted in the recitals unless the truth had been previously proved to the satisfaction of the judges to whom the bill was referred. In 1857 it was held that the recitals in private Acts of Parliament of very recent date, are not evidence of the facts stated in them, such recitals being no longer submitted to the previous approval of the judges.—*Shrewsbury Peerage Case*, 7 H. L. Cas. 1–13.

PRIVY COUNCIL. See PATENT.

The statute 5 & 6 Will. 4, c. 83, does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the Committee is limited to reporting on matters as between the public and the party applying.—*Ledsam v. Russell*, 1 H. L. Cas. 687.

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.—*Id.*

An application for renewal is “prosecuted with effect” within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.—*Id.*

The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the

PRIVY COUNCIL—continued.

original letters patent.—*Ledsam v. Russell*, 1 H. L. Cas. 687.

PROBATE. See SUCCESSION DUTIES.

1. Where a testator dies in this country possessed of personal property here, and also in foreign funds, and the executor takes out probate here, and pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain such property, and administer it.—*Attorney General v. Hope*, 2 Cl. & F. 84.

See *Attorney General v. Brunning*, 8 H. L. Cas. 245.

2. *J. R.*, by will, directed his real estates to be sold and converted into personalty; and after giving certain legacies, he thereby invested the residue in trustees, for the use of his daughter *J. A. P.* for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will; and he directed that, in default of appointment, or so far as such appointment should be incomplete, the residue be held by the trustees in trust for the next of kin of *D. R.* This power was exercised by *J. A. P.*, by her will, partly in favour of the next of kin of *D. R.*, and partly in favour of other persons:

Held (affirming the decree of the Master of the Rolls), first, that she must be considered to have had, notwithstanding the especial exclusions in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52; and that consequently legacy duty was payable by her appointees, upon the bequests made by her as being, under the 7th section, bequests made by her out of personal estates, which she had the power of disposing of; secondly, that this property, though subject to her power of disposal, was not so strictly her own property, as to render it, under the 18th section, liable to probate duty under her will, as property which she had died possessed of or

PROBATE—continued.

entitled to.—*Drake v. The Attorney General*, 10 Cl. & F. 257.

See *Thomson v. The Advocate General*, 12 Cl. & F. 1; *Attorney General v. Brunning*, 8 H. L. Cas. 243.

8. All monies recoverable by the executor by virtue of the probate, in whatever form recovered, whether through the agency of a Court of Equity, or a Court of Law, are part of the estate and effects of the testator, are legal assets, and are liable to probate duty.—*The Attorney General v. Brunning*, 8 H. L. Cas. 243.

- A., the owner of an estate, entered into a contract for the sale of it. Part of the purchase money was paid as in his lifetime. The contract contained stipulations to the effect that certain alterations might be made in the formal agreement drawn up on the original contract, and, as the purchaser was a ward of Court, that the contract should be void if not approved by the Lord Chancellor. There were also articles as to the contract being rescinded through the act of the parties on the non-payment of the purchase money, &c. Some alterations were made in the original contract; the testator had a good title; he died; and after his death the formal approval of the contract was given by the Court of Chancery:

Held, that the purchase money was to be deemed part of the "estate and effects" of the testator within the 55 Geo. 3, c. 184, schedule part 3, and was liable to probate duty.—*Id.*

4. Where a will was made by an *Englishman*, who died domiciled abroad, and the foreign Court had granted probate of his will, it became the duty of the *English* Court of Probate (some of his personal property being situated in this country), to grant ancillary probate to the foreign executors. The *English* Court had no right to constitute itself a Court of construction.

The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will.—*Enoch v. Wyllie*, 10 H. L. Cas. 1.

PROHIBITION. See ENTAIL. WILL.

PROPERTY, TITLE TO, BY OCCUPATION. See GAME.

"PROTESTANT DISSENTERS." See EVIDENCE, 47.

In the year 1710, certain members of Protestant dissenting congregations in *Ireland* subscribed sums of money for charitable purposes, and for the management of the fund executed a deed, which recited that the objects of the trusts thereof were—first, to support the Protestant dissenting interest against unreasonable persecutions; second, to educate youth designed for the ministry among Protestant dissenters; third, to assist poor Protestant dissenting congregations; and fourth, for such other pious and religious ends, and by such means, as the subscribers should think proper for promoting these objects:

Held, affirming the judgment of the Court of Chancery in *Ireland*, that Unitarian Protestant dissenters were not within the trusts of this deed.—*Drummond v. The Attorney General for Ireland*, 2 H. L. Cas. 837.

PUBLIC OFFICE. See ASSIGNMENT.

PUBLIC POLICY. See WILL.

An agreement in a family to sue out a commission of lunacy as to a member of the family is not void or illegal for champerty or maintenance, or as against public policy, or fraud on the jurisdiction in lunacy. Regard must be had to the ages and relative situation of the parties, and to the benefits secured by the issuing of the commission, in order to see whether there is consideration for the covenant.—*Perse v. Perse*, 7 Cl. & F. 279.

See *Egerton v. Brownlow*, 4 H. L. Cas. 1.

PURCHASE. See CONDITION, 2. MORTGAGE. VENDOR AND PURCHASER.

If an estate is given to a devisee, charged with payment of legacies, and he mortgages the estate to one person, and afterwards sells it to another, the purchaser will stand in

PURCHASE—continued.

the place of the legatees, but will do so, bound in equity, to make good the mortgage debt.—*Colyer v. Finch*, 5 H. L. Cas. 905.

QUALIFICATION. See OFFICE.**QUARE IMPEDIT. See ADVOWSON. EVIDENCE, 12, 13. GRANT.**

A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of *W.*, who had been shown to be a joint tenant with the plaintiff of a term of years in an advowson, alleged, "whereupon and whereby the plaintiff became and still is possessed of the said advowson, as of an advowson in gross, for the remainder of the said term so theretofore granted." The defendant pleaded that he, as Bishop of *M.*, was seised of the advowson in gross in right of his see: without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged:

Held, that a fine of the advowson in question, levied in the 1st of *James* 2, by one whose estate the plaintiff had, did not bar the action.—*Meath (Bishop) v. Winchester (Marquis)*, 4 Cl. & F. 445.

See *Carlisle v. Whaley*, L. R., 2 H. L., 392; *Exeter (Bishop) v. Marshall*, L. R., 3 H. L., 17.

QUEEN'S PROCTOR. See DIVORCE.

The 23 & 24 *Vict.* c. 144, s. 7, enables any one of the public to give to the Court of the Judge Ordinary, between the decree *nisi* and the decree absolute for a divorce, information to relieve it from being mislaid on the subject of a divorce petition. That section confers on the Queen's Proctor the power to intervene in a case of collusion, but in that alone; and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs.—*Lautour v. The Queen's Proctor*, 10 H. L. Cas. 685.

See *Wilson v. Wilson*, L. R., 1 Pr. & Div., 180.

QUEEN'S REMEMBRANCE. See JURISDICTION, 23, 24, 25.**QUO WARRANTO. See CORPORATION. PRACTICE, 186. TRIAL.**

A proceeding by information in the nature of a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office is of a public nature, and a substantive office, and not merely the function or employment of a deputy or servant, held at the will and pleasure of others.—*Darley v. The Queen*, 12 Cl. & F. 520.

The office of treasurer of the public money of the county of the city of *Dublin* is an office for which an information in the nature of a *quo warranto* will lie.—*Id.*

RAILWAY. See COMPENSATION. COMPANY. CONTRACT. DIRECTORS. MINES. PAYMENT INTO COURT.

1. A private Act of Parliament made for the construction of a railway, gave to *W.*, a landed proprietor, through whose land the railway was to pass, "the sum of one halfpenny per ton upon all goods and articles upon which a tonnage duty is charged or chargeable in virtue of this Act." The section which empowered the railway company to levy a tonnage duty contained this clause: "For every carriage conveying passengers, or goods, or parcels not exceeding 5 cwt., a sum named. There were other clauses fixing the duty payable for goods, but there was no other which referred to passengers:

Held, affirming the decree of the Court of Session, that the company was empowered to levy a tonnage duty on carriages according to their weight, when containing passengers; and that the sum to be paid to *W.* must be calculated on the tonnage so levied.—*Edinburgh Railway Company v. Wauchope*, 8 Cl. & F. 710.

W. had for some years received money on the tonnage levied on goods and parcels alone:

Held, this did not prevent him from afterwards claiming payment on the tonnage duty on passengers.—*Id.*

RAILWAY—continued.

2. An Act of Parliament authorised a railway company to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act; and by the section of the Act for settling differences between the company and owners and occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should *not agree* with the company as to the amount of purchase money, or should refuse to accept such purchase money as should be offered by the company, or should for 21 days after notice to him in writing, neglect or refuse to treat, or should *not agree* with the company for the sale of his interest, &c., or should not disclose his title if required, or in any other case where agreement for the purchase could not be made, the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands; and the sheriff should give judgment for such sum. The company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's land, &c. The jury was summoned, and assessed the value; the owner of the land attending and protesting that the company had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded, purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the requisition annexed, who assessed the sum to be paid for the property particularised in the warrant, and authorised by the Act to be taken for the railway; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum." Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given; but it appeared *aliunde*, that he did not agree with the company,

RAILWAY—continued.

and that he had received the requisite notices, in which and in the warrant the property was particularised:

Held, 1, That sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury.

2. That the impanelling a jury, and an assessment by them being facts inconsistent with an agreement, necessarily imply non-agreement; and no inquisition is defective for not stating a fact which is necessarily implied by those that are stated.

3. That notice was waived by the party's appearing and not protesting for want of notice.—*Taylor v. Clemson*, 11 Cl. & F. 610.

3. Notices given and plans and sections of an intended railway deposited in pursuance of the Standing Orders of the Houses of Parliament, previous to an application for an Act, are not to be regarded in construing that Act afterwards, unless they are incorporated therewith. — *North British Railway v. Todd*, 12 Cl. & F. 722.

A vertical deviation from the level of a railway not exceeding five feet, calculated with reference to the *datum* line shown in the plans and sections deposited in pursuance of the Standing Orders of the Houses of Parliament, is within the powers of deviation conferred by the Railway Clauses Consolidation Act for *Scotland* (8 & 9 Vict. c. 33, s. 11), although the deviation may exceed five feet, calculated with reference to the surface line shown on the said plans and sections.—*Id.*

4. A company for making a railway from *Dublin* to *Mullingar*, was incorporated by an Act of Parliament passed in July, 1845 (8 & 9 Vict. c. cxix.), under the name of "The Midland Great Western Railway Company of *Ireland*." Some of its directors provisionally registered another company for making a railway from *Mullingar* to *Gahway*, to be called "The *Gahway* and *Mullingar* Junction Railway Company." Three

RAILWAY—continued.

months afterwards this name was altered at the registration office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. *L.* applied for and received scrip and certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and he signed the shareholders' agreement and Parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to Parliament for an Act to make a railway from Mullingar to Galway, undertaking, at its own expense, to make the railway. The Act which was passed upon this petition in July, 1846 (9 & 10 Vict. c. cxxxiv.), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the Act to raise the necessary sums "by contributions among themselves or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company;" and the provisions of the recited Act (that of 1845) were to extend to and be read with the new Act. The expression "The Company," in the new Act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed, stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the other two after that in-

RAILWAY—continued.

sertion. An action was brought for those calls:

Held, that the Act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September, 1866, was not an exercise of that power, so as to render the defendant liable for any one of the calls at the suit of the Midland Great Western Company.—*Midland Great Western (Ireland) Company v. Leech*, 3 H. L. Cas. 872.

5. Under the 8 & 9 Vict. c. 20, s. 46, a railway company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to carry the road over the railway, or the railway over the road.—*The Queen v. The Directors of the South Eastern Railway Company*, 4 H. L. Cas. 471.

A mandamus to command the company to do one of these two things is therefore defective, unless it shows, on the face of it, circumstances which establish the impossibility of the company exercising this option.—*Id.*

6. Promoters of a company proposing to make a line of railway, or persons standing in a similar situation as directors of an existing company applying to Parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the purposed line, should the Bill pass, and when it has passed, such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

Secus, where the contract is itself illegal, and Parliament is to be asked to legalise it.—*Id.*

Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a Court of Equity will not, simply on that account, refuse its interference to compel specific performance.—*Id.*

RAILWAY—continued.

If the directors contract to obtain from Parliament power for the vendor to make a good title, and they make no effort to do so, they cannot allege the defect in his title (which they had undertaken to get amended) as an answer to a bill for a specific performance.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

Per Lord Campbell: Though an individual vendee may consent to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the proprietors, can do so.—*Id.*

Semble, that where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller.—*Id.*

7. Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the company after the company shall have obtained an Act of Incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation.—*Preston v. Liverpool, &c. Railway Company*, 5 H. L. Cas. 605.

It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the company's Bill in Parliament.—*Id.*

C. P. was a landowner, a railway company was projected, and for the intended railway some of his land would be required. He threatened to oppose the Bill. The projectors entered into an agreement with him, that "in case the company shall obtain an Act of Incorporation, the company shall pay to *C. P.* 1000 *l.* for all lands required by the company for the due making of the railway, and 4000 *l.* for residential injury to the estate and hall of *C. P.*" That a tunnel should be constructed in a

RAILWAY—continued.

particular manner through a part of his property, and that a passenger station should be made, &c. *C. P.* withdrew his opposition, and the Bill passed: the railway was not made, nor were the lands required:

Held, that this was not a contract which on the mere passing of the Bill entitled *C. P.* to claim from the company payment of the money.—*Preston v. Liverpool, &c. Railway Company*, 5 H. L. Cas. 605.

8. Railway company *A.* agreed with railway company *B.*, that in consideration of being allowed to use a part of *B.* line, the traffic on the part so used should be paid for according to a certain definite rate of toll which was reduced below the ordinary amount. *A.* was afterwards amalgamated with other lines which had been made since the agreement was entered into, and its own amount of traffic was increased not only by those new lines, but by their bringing it into communication with some of the chief lines of the country. *B.* had also been amalgamated with other newly created lines. In both instances the amalgamating acts had preserved all the "rights, powers," &c. of the original lines:

Held, that not only all the traffic which passed over line *A.* having originated there, but all that which came on line *A.* having originated elsewhere, might pass, on payment of the reduced rate of toll, over the part of the line *B.* which was the subject of the original agreement.—*Lancashire and Yorkshire Railway Company v. East Lancashire Railway Company*, 5 H. L. Cas. 792.

There were, however, cases in which company *A.* might deprive itself of the benefit of this agreement, as for instance, if company *A.* should, in consideration of any particular benefit or service to itself, grant to anyone a free passage along the whole distance (including therefore the particular part of the line *B.* the subject of the agreement), in which case *B.* might claim payment independently of the agreement.—*Id.*

9. At the *Bath* station of the Great Western Railway Company, goods were

RAILWAY—continued.

received for the purpose of being forwarded to *Torquay*. The line of that company ends at *Bristol*, at which place the line of the *Bristol* and *Exeter* Company begins. The goods would have to be put on a third railway before reaching *Torquay*. The receipt note given at *Bath* was thus headed: "To the Great Western Railway Company: Receive the undermentioned goods on the conditions stated on the other side. To be sent to *Torquay* station, and delivered to *R. C. Collins*, consignee, or his agent." The Great Western Company received the carriage money for the whole distance from *Bath* to *Torquay*. On the arrival of the goods at *Bristol*, they were put on the line of the *Bristol* and *Exeter* Company, where they were destroyed by fire. An action was brought against this latter company to recover compensation for the loss:

Held, that the contract was with the Great Western Company alone, and that the *Bristol* and *Exeter* Company was not liable.—*Bristol and Exeter Railway Company v. Collins*, 7 H. L. Cas. 194.

10. An Act was passed to incorporate a company to make a railway from *Bristol* to *Exeter*, and in that Act was a general direction that the charges for conveyance on the railway were to be reasonable. Several other Acts were afterwards passed, authorising the same company to make branch railways; and in one of them, which was passed to amend the previous Acts and to authorise the construction of a junction line, the 3rd section spoke of "the railway" intended to be constructed. The 19th section enacted that it should not be lawful for the company to charge in respect of persons or things "conveyed on the railway any greater sum," &c.:

Held, that the words, "the railway," in these sections were not restricted to the junction railway constructed under the authority of that Act, but extended to the whole undertaking, including the original line, the branches, and the junction line.—*Bristol and Exeter Railway v. Garton*, 8 H. L. Cas. 477.

RAILWAY—continued.

11. When the Legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Acts, it constitutes them the judges whether they will or not take these lands, provided that they act with the *bona fide* object of using the lands for the purposes authorised by the Acts, and not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the Legislature leaves it to the company to determine what lands are necessary to be taken.—*Stockton and Darlington Railway Company v. Brown*, 9 H. L. Cas. 246.

12. A railway passenger, with knowledge that the railway company, though allowing each passenger to carry, free of charge, a certain amount of luggage, required all merchandise carried to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such:

Held, that no contract whatever touching the same arose between him and the company, and therefore, on its being lost, he was not entitled to recover the value of it from the company.—*Belfast, &c. Railway Companies v. Keys*, 9 H. L. Cas. 556.

13. A railway bridge, though constructed in a more than ordinarily solid and weighty manner, and so requiring more than ordinary subjacent and adjacent supports, must be considered as something within the ordinary purposes of a railway.—*Elliot v. The North Eastern Railway Company*, 10 H. L. Cas. 333.

A vendor of land, having sold it under an Act of Parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface (though they have been expressly reserved to him, either by his grant or by the provisions of the Railway Company's Act), in such a manner as to prejudice the use of the land for the purposes for which it has been purchased. The common law right to adjacent support from the vendor's land, attaches upon such a sale, even beyond the limits of the purchased land.—*Id.*

14. All the parts of the 7th section

RAILWAY—continued.

of the "Railway and Traffic Act, 1854," must be read together, and therefore the conditions there spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be, in the opinion of a court or judge, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods.—*Peck v. North Staffordshire Railway Company*, 10 H. L. Cas. 473.

The owner of some marble chimney-pieces desired to send them to London. Messages and notes passed between him and the agent of a railway company on the subject of the terms on which they were to be carried. The agent stated as a condition that the company would not be responsible for damage to goods sent by the railway, unless their value was declared and they were insured, the rate of insurance being fixed at 10 per cent. on the declared value. After some delay the agent received a note requesting that the marbles might be forthwith sent to London, "not insured"; they were sent and suffered damage :

Held: (*dis. Lord Chelmsford*), that the condition thus sought to be imposed by the company was not just and reasonable; that there was not any special contract signed by the parties within the meaning of the 17 & 18 Vict. c. 31, s. 7; that the note could not be connected with the other communications so as to constitute the required contract; that the words "not insured," could not be made the subject of explanation by parol evidence; and that they left the rights and liabilities of the parties as at common law.—*Id.*

Per Lord Cranworth: The burden of showing that a condition is just and reasonable, lies on the railway company.—*Id.*

Simons v. The Great Western Railway Company (18 Com. Ben. 805), confirmed.—*Id.*

Per Lord Wensleydale: A plea alleging this condition as a bar to the whole cause of action, is bad.—*Id.*

RATE. See CHURCH RATE. POOR RATE. VESTRY.

There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act, under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective.—*Harrison v. Stickney*, 2 H. L. Cas. 108.

The 2 Will. 4, c. 50 (public local), for draining the lands of *Holderness*, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner, under that Act, borrowed money (on which interest became due) for the purposes of the works directed by the Act:

Held, that a rate made to pay off the debt thus incurred was under the provisions of that Act a valid rate.—*Id.*

REALTY AND PERSONALTY. See PERSONAL ESTATE. WILL.

1. Where money is directed to be vested in land or other security, but the conversion has not, in fact, taken place until the whole interest, whether in land or money, has become vested absolutely in one person, any act of his, indicating an option in which character to take or dispose of it, will determine the succession as between his real and personal representatives.—*Cookson v. Cookson*, 12 Cl. & F. 121.

A testator gave his residuary estate to his wife, and appointed her his executrix, with the tuition of his younger children, and to provide for them with regard to their fortunes; and he advised her thus:—"As to my son John, I would have 250*l.* a year paid him until a sum of 10,000*l.* can be invested in land or some other securities, which is to be invested in trustees, for his use, as to the interest of such money, or produce of such lands, for his natural life; and if he marries with consent, &c., that he may make such settlement on such wife, &c., as you may judge proper; and that the remainder may go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son Isaac, and his heirs for ever." The sum of 10,000*l.* was

REALTY AND PERSONALTY—continued.

vested partly in personal securities, and partly on mortgage of real estate; and on the death of *John*, without any child, his widow, being entitled to the interest for life, and *Isaac* entitled to the principal on her death, by their acts indicated their intention to take the fund as money. *Isaac* survived the widow, and died intestate:

Held, that even if the fund had been impressed by the will with the character of real estate, which was doubtful, it was re-converted into personalty by the subsequent acts of the party absolutely entitled, and therefore it belonged to the next of kin of *Isaac*, and not to his heir.—*Cookson v. Cookson*, 12 Cl. & F. 121.

2. A testator devised his real and personal estate to certain persons, and gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c., and to settle the same when purchased, to such uses as were declared "of his manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, and premises devised by this my will, as shall be then existing, undetermined, or capable of taking effect, &c., to and for no other estate, use, trust, or purpose whatsoever:"

Held, that this power to trustees to convert personalty into realty did not operate as an absolute conversion.—*De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

3. The right of hunting, shooting, &c., is an interest in the realty and the grant of it is a license of a profit *à prendre*.—*Ewart v. Graham*, 7 H. L. Cas. 331.

RECEIVER.

1. A receiver cannot be permitted to enter into an agreement with his sureties by which he, in effect, indemnifies them against any loss that may accrue from his dealing with the receiver's fund. The security for his good conduct must not be worked out of the estate itself.—*White v. Baugh*, 3 Cl. & F. 44.

Nor can he be permitted to put the fund entrusted to his care under

RECEIVER—continued.

their control, or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be able to act with promptitude on any emergency.—*White v. Baugh*, 3 Cl. & F. 44.

It makes no difference in such a case that the arrangement between the receiver and his sureties has not been the direct cause of a loss, nor that neither of them has obtained any personal advantage from it.—*Id.*

Where an order has been made in a cause, directing a receiver to pay the fund to a particular person, and that person dies, the receiver is not bound in the first instance to take out a representation to the deceased, nor to apply to have the order revised; it is sufficient for him to keep the money in the custody in which it was originally placed, until the state of the proceedings in the Court enables him to pay it over.—*Id.*

2. A creditor of a partnership, consisting of two persons, had received from one of them joint and several promissory notes, accepted by himself and by a third party, a married woman having separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title-deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes and other securities which he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of the creditor, and he had not taken any steps to inform the surety as the notes became due that she had become or continued liable upon them. In a bill for an account and a receiver, filed by the creditor, the surety put in an answer detailing these circumstances, and alleging fraud:

Held, affirming the decree of the Lord Chancellor (who had reversed an order of the Master of the Rolls), that this was not a case in which the Court would interfere by appointing a receiver.—*Owen v. Homan*, 4 H. L. Cas. 997.

RECEIVER—*continued.*

3. Payment of interest on an *Irish* mortgage made by a receiver appointed under the 11 & 12 *Geo.* 3, c. 10 (*Ir.*), over the estates mortgaged, is, within the terms of the 40th section of 3 & 4 *Will.* 4, c. 27, payment by "an agent" of the party liable.—*Chinnery v. Evans*, 11 H. L. Cas. 115.

The words in the 40th section "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing of an acknowledgment.—*Id.*

There was a mortgage extending over three estates; a receiver was appointed. His appointment, in form, extended over all; in fact, he only received the rents of one of the estates. A payment by him out of the rents received from this one estate was treated as a payment made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand as to any of the estates comprised in the mortgage.—*Id.*

4. The appointment of a receiver in a suit puts an end to the power of a trustee appointed for the benefit of creditors, to collect the rents.—*McDonnell v. White*, 11 H. L. Cas. 570.

The duty of a receiver appointed in a suit, relates (by the law of *Ireland*) as well to the arrears due from the tenants at the time of his appointment as to those which would afterwards become due, and in a case in which no steps were taken by the receiver to enforce payment, from the trustee of arrears, which he had suffered to accumulate, his estate could not, after the lapse of many years, be made liable for those arrears.—*Id.*

RECOGNIZANCES.

Quare, whether a judgment which directs that each of several defendants shall enter into recognizances to keep the peace, &c. "for the space of seven years next ensuing the acknowledgment thereof," is good, no period being fixed for entering into the recognizances?—*O'Connell v. The Queen*, 11 Cl. & F. 156.

RECORD. *See* PRACTICE.RECOVERY. *See* FINE AND RECOVERY.RECTORY. *See* ADVOWSON. PREBEND.

The 3 & 4 *Will.* 4, c. 37, s. 124, empowers the Lord Lieutenant and Privy Council in *Ireland* to disappropriate, disunite, and divert any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishopric, deanery, or archdeaconry, dignity, prebend, or canonry, and to unite any such rectory, vicarage, tithes, or portions of tithes, to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes and glebes, or part or parts thereof, shall, with its respective vicarage, perpetual or other curacy, form a distinct parish or benefice."

Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory; that the word rectory in the statute must be applied in its widest legal sense, and therefore included the glebe; and that an order of disappropriation of "the rectory," made by the Lord Lieutenant and Privy Council, could not be restricted to the tithe rent-charge, unless on the face of the order of disappropriation such restriction was manifested.—*Wilson v. Loveland*, 12 Cl. & F. 677.

In an order of the Lord Lieutenant and Council, made under this Act, there was a statement of the revenues of three rectories belonging to a cathedral treasurership. The order then went on to say, "There is a farther income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of 80*l.* 6*s.* 1*½d.*" The glebe lands, which were not in express terms mentioned in the order, did amount to nearly the sum thus stated. A small piece of land, called the treasurer's garden, made up the rest. After this statement of the revenues, the order went on to disappropriate the "rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the Act, but said nothing about the glebe:

RECTORY—continued.

Held that the glebe lands were, under this order, disappropriated from the treasurership.—*Wilson v. Loveland*, 12 Cl. & F. 677.

REDUCING INTO POSSESSION. See GAME.**REGISTRATION AND REGISTRY ACTS. See ASSIGNMENT, 5. IRISH TENANTRY ACTS. LEASES FOR LIVES. MORTGAGE. SETTLEMENT.**

1. A term for 399 years in certain lands in *Ireland*, being vested in *B.* for life, with residue in his daughter, a settlement is made on the intermarriage of the daughter and *W.*, by which the whole term is conveyed to trustees on trust, to pay the rents and profits to *B.*, the father, for life, then to *W.*, the husband, for life, then to the daughter for life, if she survived him, and afterwards to convey the term to the first son. This settlement is not registered. On the death of *B.*, the father, *W.*, the husband, demises the whole term for valuable consideration to *K.*, and the indenture is duly registered; and *K.* afterwards assigns for like consideration, his lease of the term to *I.*:

Held, by the House of Lords, in conformity with the unanimous opinions of the attending common law judges, that the registered indenture shall prevail over the unregistered settlement; and that the title of the assignee of the lease is to be preferred to that of the widow of *W.*, and of the trustee under the settlement; and that this is so, whether the assignment from *K.* to *I.* was registered or not, for the unregistered assignment would pass the interest as between the lessee and the assignee, and there was no conflicting claimant under a registered deed; and this construction of the Registry Act, 6 *Anne*, c. 2, holds good whether the party executing the prior secret conveyance and the subsequent registered deed, be the same party or not.—*Warburton v. Loveland*, 2 Dow & C. 480.

See *Carlisle v. Whaley*, L. R., 2 H. L., 399.

2. Under the Irish Registration Act (6 *Anne*, c. 2), an equity in a grant which is registered, will prevail

REGISTRATION, &c.—continued.

against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed.—*Mill v. Hill*, 3 H. L. Cas. 828.

A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties. This description was not one of the things required by the statute:

Held, not to vitiate the effect of the memorial under the Registration Act.—*Id.*

In 1830, a settlement of certain property, held under renewable leases, was made in favour of *A.* In 1831, *A.*, being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The settlement of 1831 was registered. In 1840, *A.*, being in actual possession, sold to *B.*, and *B.*, who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of *A.*, his son, who was entitled under the settlement of 1831, filed a bill against *B.* to set aside the sale, and for an account, and for waste:

Held, that it was not necessary to register the deed of 1830; that the registered settlement of 1831 prevailed against the *bonâ fide* purchase of *B.*, and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement.—*Id.*

But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of those improvements; and that, being a *bonâ fide* purchaser, without misconduct,

REGISTRATION, &c.—*continued.*

he ought not to be charged with costs.—*Mill v. Hill*, 3 H. L. Cas. 828.

3. A duly registered memorial of an indenture was held admissible as secondary evidence of the indenture.—*Sadlier v. Biggs*, 4 H. L. Cas. 435.

4. *J. S.*, under his marriage settlement, was seised of certain estates in the county of *Clare*, for life, remainder to his sons successively in tail, subject to a charge of 5000*l.* as a provision for younger children. *B. S.* was the eldest son of this marriage, *W. S.* another son, and there was a daughter, *Diana*. *J. S.* afterwards purchased other estates, one of which was called *K.*, which in 1806 he conveyed by way of mortgage security to the Bishop of *Elphin*. In February, 1807, he executed a deed, by which, assuming to be the owner in fee of *K.*, he conveyed it and other lands to trustees for himself for life, then to his eldest son, *B. S.*, for life, remainder to the eldest and other sons of *B. S.* successively in tail. This deed contained a covenant on the part of *B. S.* to pay *J. S.*'s debts, and to discharge a sum of 2000*l.* which *J. S.* had undertaken to pay to two children of *Diana*: and also an assignment by *J. S.* of his personal estate in favour of *B. S.*, who was thereby appointed the attorney of *J. S.*, with power to call in the debts due to him. The deed was registered (apparently without the knowledge of *J. S.* or of *W. S.*) upon the 1st June, 1807. On the 13th June, 1807, by a deed, to which *J. S.*, *B. S.*, two trustees, and *W. S.* were parties, *J. S.* granted and *B. S.* confirmed to the trustees the lands of *K.* to *J. S.* for life, then to *W. S.* for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed *W. S.* gave up his share of any benefit from the provision for younger children under his father's marriage settlement or otherwise. This deed was registered a few days afterwards. *J. S.* died in November, 1808, and *W. S.* entered into possession of the lands of *K.* *W. S.* married in 1815, and *B. S.* was a party

REGISTRATION, &c.—*continued.*

to his marriage settlement, in which the lands of *K.* were included, and by which, under the power contained in the deed of June, 1807, *W. S.* created a jointure for his wife. *B. S.* paid his father's debts, satisfied the mortgage on the lands of *K.*, obtained a reconveyance of them to himself, and died in 1837, having allowed *W. S.* to remain in undisturbed possession up to that time. *W. S.* continued in possession, and died in 1843. The son of *B. S.*, claiming under the deed of February, 1807, brought ejectment against the son of *W. S.*, who relied on the deed of June for his title. At a trial of this ejectment, the jury found that the deed of February, 1807, was a voluntary deed, and that that of June, 1807, was given for a valuable consideration. The Court of Queen's Bench in *Ireland* directed a new trial, which took place, but the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was filed by the plaintiff in the Court of Chancery there, to have the trusts of the deed of February, 1807, carried into execution, and that Court decreed accordingly:

Held, that the decree was right; that after what had occurred at law, it must be assumed that the deed of February, 1807, was given for a valuable consideration, and that the deed of June, 1807, was a voluntary deed; and farther, that the subsequent marriage of *W. S.*, and the circumstances attending it, did not constitute his children purchasers for value under the latter deed, which could not prevail against an earlier and a previously registered deed that had been executed for a valuable consideration.—*Scott v. Scott*, 4 H. L. Cas. 1065.

5. Under the 2 & 3 *Vict.* c. 11, if *A.* has a judgment registered under the 1 & 2 *Vict.* c. 110, such registration will protect him against all who become mortgagees or purchasers during the currency of the five years, and such protection will continue, as to them under a re-registration, even though he should have omitted to re-register within five years; but as to persons becoming

REGISTRATION, &c.—continued.

mortgagees or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him. (*Beavan v. Lord Oxford*, 6 De G., M., & G. 492, approved.) — *Shaw v. Neale*, 6 H. L. Cas. 581.

6. *J. S.* on the 6th October, 1855, made an equitable mortgage of his estate to *E.* This mortgage was not registered. On the 25th August, 1856, *D.* obtained a decree in the Court of Chancery against the estate of *J. S.*, and on the 7th November, 1856, registered this decree as a mortgage under the 13 & 14 *Vict.* c. 29 (*Ir.*):

Held, that this registration had not the effect, under the provisions of that statute, of giving a priority to the decree over the equitable mortgage to *E.* — *Eyre v. McDowell*, 9 H. L. Cas. 619.

A registered judgment under the provisions of the 3 & 4 *Vict.* c. 105 (*Ir.*) and the 13 & 14 *Vict.* c. 29 (*Ir.*), only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and therefore does not displace the interest of a previous equitable mortgagee. — *Id.*

REMAINDER. See EJECTMENT. WILL.**RENEWABLE LEASES. See IRISH TENANTRY ACTS. LEASES FOR LIVES. REGISTRATION.****RENT CHARGE. See ANNUITY. COVENANT. LANDLORD AND TENANT.**

1. Where a lease contains a personal covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property, and so far as relates to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued before the surrender. — *Attorney General v. Coz*, 3 H. L. Cas. 240.
2. *A.* granted an annuity, to commence after his death, and which he charged on certain lands, to which lands he

RENT CHARGE—continued.

declared himself entitled in fee simple, and over them he gave a right of distress in respect of the annuity. It afterwards appeared that as to the greater part of these lands he was only entitled to a life estate. After the discovery of the defect in the grantor's title, a small part of the lands charged (of which part the grantor had been seised in fee) was sold: the grantee of the annuity received the purchase money in part discharge of the arrears:

Held (*diss.* Lord *St. Leonards*), that this did not destroy her right to proceed on the covenant. — *Monypenny v. Monypenny*, 9 H. L. Cas. 114.

Per Lord *St. Leonards*: She had thereby elected to treat the annuity as a rent-charge, and could not afterwards proceed to recover it as a mere annuity. — *Id.*

RES JUDICATA. See PRACTICE. PROBATE.

1. To render the matter of a judgment a *res judicata*, so as to make this a valid plea, it is necessary not only that the subject and parties, but that the grounds of the judgment, or *media concludendi*, should be the same. — *Graham v. Maxwell*, 2 Dow, 314.

Where, therefore in a contest between creditors of a deceased person and his widow, a judgment on a general obligation, given by the deceased, had been pronounced, but a particular obligation entered into by the deceased, though known to the parties, and included among the documents produced in the cause in the Court below, had never been made by any of the parties the subject of consideration, the effect of that particular obligation when properly adverted to, and made the subject of discussion in a subsequent stage of the cause, was held (reversing the judgment of the Court of Session) not to be governed by the preceding decision, but still to be a subject for consideration. — *Id.*

RESIDUE. See WILL.

1. A gift of residue cannot be a satisfaction of a debt, but may be a satis-

RESIDUE—continued.

faction of a portion.—*Thynne (Lady E.) v. Glengall (Earl)*, 2 H. L. Cas. 154.

2. *T. H.*, a merchant in partnership with *A. H.*, died in 1790, unmarried and intestate, possessed of leasehold property, and leaving his sisters, *Lady S.* and *Mrs. D.*, his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent; and *Lady S.* and *Mrs. D.*, with consent of their husbands, duly renounced administration of his estate. By indenture made between *Sir W.* and his wife, *Lady S.* of the first part, the said *A. H.* of the second part, and his then new partner *R.* of the third part, after reciting that the former partnership was insolvent, that *A. H.* and *R.* had undertaken to settle with the creditors by composition, which could not be effected without administration of *T. H.*'s personal estate, and that there had been money transactions between him and *Sir W. S.*, of which neither had kept any account, *Sir W. S.* and *Lady S.* renounced, at *R.*'s request, all their right to the said administration in favour of *A. H.*, who, in consideration thereof covenanted, after obtaining such administration, to release *Sir W. S.* from all claims which he, as administrator of *T. H.* or otherwise, might have on *Sir W. S.*; and *Sir W. S.*, in consideration of such release, covenanted for himself, his heirs, executors, and administrators, and for his said wife, that they, *Sir W.* and *Lady S.*, would, after such administration should be granted to *A. H.*, execute to him, his executors, and administrators, a release of all claims whatsoever which they might have on him as administrator of *T. H.*, or otherwise. The creditors also by a composition deed, agreed to accept 15 s. in the pound, payable by instalments by *A. H.* and *R.*, and to allow *A. H.* to take out administration of the estate of *T. H.* Afterwards *D.*, the husband of *Mrs. D.*, by a deed poll, after reciting that he had an unsettled demand against *T. H.*'s estate, and that the effects of the late partnership, together with *T. H.*'s private estate, were insufficient to pay

RESIDUE—continued.

the partnership debts, and that the creditors entered into a composition and agreement with *A. H.* and *R.* as aforesaid—declared that a bond for 1000*l.* given to him by *A. H.* and *R.*, pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from *T. H.*, and of all claims whatsoever of him, *D.*, on the estate and effects of *T. H.* *A. H.* then took out letters of administration of *T. H.*'s estate, and in order to pay the creditors, raised sums of money by annuities and mortgages on the said leasehold property, *R.* joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into farther arrangements with the creditors, and soon afterwards dissolved partnership. *R.* remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee-simple, and dealing with them as his own for several years, without any interference by *A. H.* or the said next of kin, or their husbands, who survived them—all of whom died between the years 1797 and 1815,—he (*R.*) mortgaged them in 1815, to secure debts due by him to *D.* and Co., subject to the leases possessed by the intestate; subject to which he also in 1818, released to them the equity of redemption, and they afterwards sold the property in fee to other parties. A bill to redeem the premises was filed against the mortgagees and purchasers in 1831 by the administrator *de bonis non* of *T. H.*, claiming also as representative of the next of kin. There was no proof of the execution of a release in pursuance of the covenant by *Sir W.* and *Lady S.*, except that it appeared from their deceased attorney's bill-book that he had prepared such release:

Held, by the Lords, that it was immaterial whether such releases were executed or not, as the various acts of ownership exercised over the leasehold property by *A. H.* and by *R.* and those deriving under him, all dealing with it as their absolute property for a period of 37 years,

RESIDUE—continued.

with the acquiescence of the next of kin, and their representatives, established beyond all doubt an agreement by the next of kin to give up all their interest in it, in consideration of the arrangements of 1790.—*Skeffington v. Budd*, 9 Cl. & F. 219.

Semble, if the residue had not been so released, and time and the acts and the acquiescence of the parties had not been a bar to a bill to redeem, the administrator *de bonis non* of the intestate would be entitled to sustain such bill, notwithstanding that the equity of redemption had been reserved to the original administrator's representatives, and not the administrator of *A. H.*, the former administrator.—*Id.*

3. A testator devised "all my estate, both real and personal, to *E. E.*, his executors, administrators, and assigns, to and for the several uses, intents, and purposes following, that is to say;" and then, after specifying various objects of his bounty, appointed "the said *E. E.* executor of this my last will and testament." The trusts of the will did not exhaust the estate:

Held, affirming a decree of Lord Chancellor *Cottenham*, that *E. E.* did not become entitled to the residuary personal estate for his own benefit, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. (*Dawson v. Clark*, 18 Ves. 247, approved.)—*Ellicock v. Mapp*, 3 H. L. Cas. 492.

The rule in such case is, that where a "plain implication or strong presumption" appears that the testator by naming an executor meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus.—*Id.*

See *Salmorah v. Barrett*, 29 Beav. 474; 3 De G., F., & J. 279; *Enohin v. Wylie*, 10 H. L. Cas. 1.

4. A person having a charge for life on residue, has, to the extent of that charge, the rights of a residuary legatee, and is entitled to have the resi-

RESIDUE—continued.

due ascertained, and secured within, if possible, one year after the death of the testator. It is the duty of the executor to do all in his power to effect that object.—*Wightwick v. Lord*, 6 H. L. Cas. 217.

5. The rules which are applicable to a gift of residue are applicable also to the parts into which that gift may be divided.—*Bective v. Hodgson*, 10 H. L. Cas. 656.

RESULTING TRUST. See CHARITY, 7. WILL, 10.

REVERSION. See LANDLORD AND TENANT. MORTGAGE. WILL.

1. A father, by a voluntary deed, conveyed certain estates to trustees, upon trust, to allow him the rents and profits for life, then to the use of his son, his executors, administrators, and assigns. He subsequently made a settlement of the same premises on the marriage of his son, by which he gave up the immediate rents and profits to the son, and after some farther limitations, reserved the ultimate reversion to himself:

Held, that the voluntary deed remained in force so far as it was not revoked by the marriage settlement, and that the reversion belonged to those claiming under the son, and not to those claiming under the father.—*Croker v. Martin*, 1 Dow & C. 15.

2. There can be no avowry for a rent-charge upon land payable to one who has no reversion.—*Pluck v. Digges*, 2 Dow & C. 180.

A. entered into a lease for lives, renewable for ever, assigned the whole of his estate and interest in the lands to *B.*, reserving a rent and a power of distress and re-entry, but no reversion. The rent being in arrear, *A.* distrained and *B.* replevied. *A.* made avowry under the *Irish* statute 25 Geo. 2, c. 13 (corresponding to the *English* statute 11 Geo. 2, c. 19) giving landlords the remedy by distress, and had judgment:

Held, in the House of Lords, that the judgment must be reversed, for that the statute applied only to leases in

REVERSION—continued.

which there was a reversion, or an interest vested in the lessor at the expiration of the lease.—*Pluck v. Digges*, 2 Dow & C. 180.

See *Roberts v. Mayne*, Cas. temp. Nap. 175, 196.

REVIEW, BILL OF. See PRACTICE.

REVIVAL OF SUIT.

A. a defendant, as administrator on the nomination of the Crown, in a suit by the alleged next of kin, died; B., his successor in office, took out letters *de bonis non*. A bill to revive the suit was filed, and an order made thereon recited the prayer of the bill thus: that the said suit and proceedings, which had so become abated as aforesaid, might be revived, and be in the same plight and condition against B. as they were at the time of the death of A., and that the plaintiffs might have the same relief against B. as they would have been entitled to and had against A. had he still been living," and then added, "which is hereby ordered by the Court as prayed."

Held, that this order did not of itself create any liability in B., but merely put the suit in the same state as it had been in before A.'s death.—*The Attorney General v. Köhler*, 9 H. L. Cas. 654.

RIVER.

1. Upon an issue raising the question what was to be considered "river" and what "sea," a direction "that the thing to be looked to is the fact of the absence or the prevalence of the fresh water, though strongly impregnated with salt," is erroneous.—*Horne v. Mackenzie*, 6 Cl. & F. 628.

The mouth of a river comprehends the whole space between the lowest ebb and the highest flood mark.—*Id.*

2. The bed of all tidal navigable rivers and of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, and the right to anchor is a necessary part of the right to navigate. This right never could

RIVER—continued.

have been interfered with by grant from the Crown.—*Gann v. The Free Fishers of Whistable*, 11 H. L. Cas. 192.

The grant, therefore, of an oyster bed in an arm of the sea below low-water mark, must have been taken by the grantee, subject to the public right of navigation; and he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right.—*Id.*

A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due.—*Id.*

Evidence of mere immemorial usage will not support such a claim.—*Id.*

A liability to make compensation for actual injury done to the oysters by anchoring, is not to be confounded with a liability to toll for casting anchor in the soil itself.—*Id.*

The Mayor of Colchester v. Brooke (7 Q. B. 339), observed upon.—*Id.*

ROAD AND ROAD TRUSTEES. See CANAL AND ROAD ACTS. COMPENSATION. RAILWAY.

1. Certain of the trustees under an Act of Parliament for making a road, the fund provided by the Act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, and afterwards bring an action against the other trustees, who had attended any of the meetings, for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorised at the meeting or meetings which they attended:

Held, at first, by the Court of Session that the mere fact of presence at meetings did constitute a *prima facie* ground of personal liability,

ROAD AND ROAD TRUSTEES—*continued*.

and that the *onus* lay on the defenders to show, if they could, facts and circumstances exempting them from that personal liability. But on an appeal to, and a remit by, the House of Lords, held, that the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability, and that the *onus* lay upon the pursuers to show acts beyond mere attendance done by the defenders to render them personally liable; and therefore the defences of those trustees, against whom nothing was alleged and proved, except the mere fact of presence at meetings, were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expenses of such contracts as they signed; and this judgment affirmed in *Dom. Proc.*—*Higgins v. Livingstone*, 4 Dow, 341.

Dicente Lord Eldon (Chancellor): That when trustees confined themselves to the Act of Parliament and the application of the Parliamentary funds, they were not personally liable; but that this also rested on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors.—*Id.*

See *Rashdall v. Ford*, L. R., 2 Eq., 752.

2. The trustees appointed under a public road Act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road.—*Duncan v. Findlater*, 6 Cl. & F. 894.

The funds raised by such Act cannot be charged with the compensation of such an injury, the persons employed on the road not being in the situation of servants to the trustees.—*Id.*

See *Mersey Dock v. Gibbs*, 11 H. L. Cas. 686; L. R., 1 H. L., 93.

ROYAL MARRIAGE ACT.

The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted, in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of England, or without.—*Sussex Peerage Case*, 11 Cl. & F. 85.

SALE. See AUCTION. CHARITY. FRAUD, 2. INCUMBERED ESTATES COURT. SHERIFF.

1. *M.* purchased an estate held by *S.* in *feu*, with a clause of pre-emption in favour of the superior, under penalty of forfeiture. The son of *S.* claimed to be entitled to the estate after his father's death, and denied the validity of the sale, upon the ground that no formal offer of pre-emption had been made to the superior, and refused by him. The purchaser in open Court consented to take the sale without the usual warranty, and the sale was thereon sustained.—*Scotland v. Mercer*, 1 Dow, 229.
2. A sale of an estate effected by a tenant for life in fraud of an infant remainderman, though effected under colour of a decree in equity, is not protected; but the remainderman on coming of age may have the sale set aside.—*Colclough v. Bolger*, 4 Dow, 54.

See *Mullins v. Townsend*, 2 Dow & C. 430; *Bandon v. Becher*, 3 Cl. & F. 479.

3. Upon a bill filed by a remainderman in tail, to set aside a sale of lands made nearly 50 years before, under a decree in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate, on the ground of irregularities and error in the proceedings and fraud in the sale:

Held, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable.—*Bowen v. Evans*, 2 H. L. Cas. 257.

SALE—continued.

- A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or from errors in dealing with the purchase-money.—*Bowen v. Evans*, 2 H. L. Cas. 257.
4. A debtor assigned his house and business, in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust-deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, at a general meeting :
- Held, that a sale afterwards made by the trustees, without farther notice, was unauthorised and unlawful.—*Tomney v. White*, 3 H. L. Cas. 49.
5. The presumption in a gift of lands for charitable purposes, is that they are devoted "for ever" to the purposes of the charity, and that no authority to sell them is intended ; but a sale of such lands at a distant date with long acquiescence in such sale, and no account of the origin of the charity, may give rise to a presumption that there had been a power enabling the holders of the charity lands to sell them, and that the sale was made under that power.—*St. Mary Magdalen v. The Attorney General*, 6 H. L. Cas. 189.
6. *Quære*, whether, where a sale is ordered by the Court of Chancery, a sale by auction and a sale on sealed tenders can be considered identical?—*Barlow Osborne*, 6 H. L. Cas. 556.
- On a sale made, under such an order, by private contract, the practice of opening biddings is inapplicable.—*Id.*
7. A covenant for the sale of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

SALE—continued.

8. A conveyance made under 21 & 22 Vict. c. 72 ("Sale and Transfer of Lands, Ireland") is, by s. 85, "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken.—*Power v. Reeves*, 10 H. L. Cas. 645.

Where, therefore, proceedings had been taken for the sale of certain estates, and their sale and re-sale had been directed in a manner which, when presented to the notice of this House, was declared to be marked with great irregularity, but the party complaining had not brought the matter before the Court of Appeal until after the conveyances had been executed, it was held that this House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities.—*Id.*

9. In a contract for sale of an estate where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and transfers to him a corresponding portion of the estate.—*Rose v. Watson*, 10 H. L. Cas. 672.
10. A covenant for the sale or mortgage of future acquired property, if capable of specific performance, transfers to the vendee or mortgagee the beneficial interest in the property as soon as it is acquired.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

SALVAGE. See INSURANCE.

SATISFACTION OF DEBT OR PORTION. See WILL.

There is a distinction between satisfaction of debts, and of a portion by legacy. Equity leans against satisfaction of debts by legacy, but in favour of a provision by will, being in satisfaction of a portion by contract. Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in the case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be satisfaction of a portion *pro tanto*. A gift of residue cannot be a satisfac-

SATISFACTION OF DEBT, &c.—*continued.*

tion of a debt, because the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy *pro tanto*, so on principle a residue ought to be considered as satisfaction of a portion altogether, or *pro tanto*, according to the amount.—*Lady E. Thynne v. Earl of Glengall*, 2 H. L. Cas. 154.

See *Hopwood v. Hopwood*, 7 H. L. Cas. 728.

SAVINGS BANKS.

By the 22nd section of the Act 9 Geo. 4, c. 92, an Act to consolidate and amend the laws relating to savings banks, it was ordered, that within six weeks after the 20th of November, 1828, the trustees and managers of the different savings banks then established, should ascertain the amount of the increased funds of their respective banks up to the said 20th of November, and should, as soon afterwards as conveniently could be, after retaining so much as might be necessary for the future management of the said savings banks, respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of that Act; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees or managers, or the major part of them, at any general meeting convened according to the respective rules and regulations of such savings banks, should think fit.

The increased fund of the *Arundel Provident Bank* (established in 1818), up to the 20th of November, 1828, was ascertained to amount to 742*l.* 15*s.* 11*d.* The rules and regulations of the bank did not contain any direction as to the mode of applying this surplus, but by one of the rules, and also by the said Act, the trustees and managers were not to have any benefit from the application of it. Previous Acts, repealed and consolidated by this Act, provided that the surplus should be disposed of among the depositors, as the trustees should think fit. The majority of the trustees of the *Arundel Provident Bank*,

SAVINGS BANKS—*continued.*

present at a general meeting regularly convened, resolved to appropriate 592*l.* 15*s.* 11*d.* of the surplus to the widening of the bridge on the River *Arun*, and the same was paid over accordingly to one of themselves, who was bridge master:

Held, by the Lords (affirming an order and decree of the Court below), that this was a misapplication of the fund, and a breach of trust; and though the money was expended on the bridge, the parties were personally liable to refund it.—*Holmes v. Henty*, 4 Cl. & F. 99.

SCHOOLS. See CHARITY.

SCIRE FACIAS. See PRACTICE. 14 & 15 VICT. c. 76, s. 132. 17 & 18 VICT. c. 125, s. 91.

1. A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

A judgment was obtained in 1813. It was revived by *scire facias* in 1828. A bill was filed in 1838, in the Court of Exchequer in *Ireland* against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40):

Held, that the *scire facias* created new rights, and that the plea was no bar to the suit.—*Id.*

2. To a writ of *scire facias* issued in 1837 by the executors of the conusee of a judgment recovered in 1810, against the heirs and terre-tenants of the conusor, one of the terre-tenants pleaded the 40th section of the statute 3 & 4 Will. 4, c. 27; to which the executors replied a judgment of revivor, recovered by themselves within 20 years before the issuing of the *scire facias*:

Held, by the Lords (agreeing with the unanimous opinion of the judges of *England*, and reversing a judgment of the Court of Exchequer Chamber in *Ireland*),

1. That the plea was a sufficient

SCIRE FACIAS—*continued.*

answer to the claim stated in the writ.

2. That the replication was a departure from the writ, and therefore bad on general demurrer.

3. That a new right accrued to the executors by the judgment of revivor recovered by themselves.—*Furran v. Berresford*, 10 Cl. & F. 319.

Semble, that if the executors had issued the *scire facias* on the judgment revived by them within the 20 years, the statute would not have barred the claim.—*Id.*

Semble, that the Irish statute 8 Geo. 1, c. 4, s. 2, is repealed, so far as judgments are concerned, by the statute 3 & 4 Will. 4, c. 27, s. 40.—*Id.*

SCOTLAND.

1. *Semble*, that the Officers of State in Scotland are the proper parties to institute process to set aside an alleged grant of the property of the Crown in that country.—*The Lord Advocate v. Dunghlas (Lord)*, 9 Cl. & F. 173.

That such action brought by the Lord Advocate, in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.—*Id.*

That in such an action the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*Id.*

See *Corporation of London v. The Attorney General*, 1 H. L. Cas. 440.

2. The law as to actions against attorneys or law agents for negligence in the management of causes, is the same in England and in Scotland.—*Purves v. Landell*, 12 Cl. & F. 91.

3. The words "existing interests" in the 57 Geo. 3, c. 64, which was passed to regulate certain public offices in Scotland, do not mean the right of the holder of one office to appoint to another.—*Rosslyn (Earl) v. Aytoun*, 11 Cl. & F. 742.

4. The Act 4 & 5 Will. 4, c. 22, for the equitable apportionment of rents

SCOTLAND—*continued.*

annuities, and other periodical payments, extends to Scotland.—*Fordyce v. Bridges*, 1 H. L. Cas. 1.

5. The Officers of State in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea shore, the suit being instituted by them solely to protect the public right. The judgment, on being appealed against, was affirmed, but it was affirmed without costs.—*Smith v. Officers of State in Scotland*, 2 H. L. Cas. 807.

SEA. See SCOTLAND, 15.

1. Lands formed slowly and gradually and imperceptibly by alluvion on the sea shore, belong by general immemorial custom, to the owner of the adjoining lands, and not to the Crown. So decided by the House of Lords, in concurrence with the unanimous opinion of the judges.—*The King v. Lord Yarborough*, 1 Dow & C. 178.

2. The King granted to the mayor and burgesses of a town a charter, conferring several benefits upon the corporators, and willed "them and their successors all and singular the buildings, banks, sea-shore, &c. within the borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain, and support."

Held, that by accepting this charter the corporators became bound to repair the buildings and banks, and sea-shore, &c., and were liable for any damages occasioned by non-repair.—*Mayor, &c. of Lyme Regis v. Henley*, 2 Cl. & F. 331.

3. The right to the bed of all navigable rivers and of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The grant of an oyster-bed to an individual subject must therefore be taken, subject to the public and general right of all the subjects, freely to navigate the sea and rivers, and to anchor where necessary.—*Gann v. The Free Fishers of Whitstable*, 11 H. L. Cas. 192.

SEAMEN'S WAGES. *See* EMBARGO.

SEAWORTHINESS. *See* INSURANCE.

SECESSION. *See* CHURCH, 1.

SECURITIES. *See* ATTORNEY AND CLIENT. COUNSEL. PRINCIPAL AND AGENT.

1. *A.* being tenant in tail of large estates expectant on the death of his father, in consideration of 6000 *l.* and 10,000 *l.* advanced to him by *O.*, charged the estate with 12,000 *l.* and 20,000 *l.*, to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43; and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities, and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post-obit* securities, and no consideration for the annuity; and at the hearing he gave evidence that the consideration for the two sums of 12,000 *l.* and 20,000 *l.* was not the full value, according to the tables and calculations of actuaries. *O.* gave no evidence:

Held, that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what at the time of the transaction was the fair market price of the two sums so secured to be paid, regard being had to the age of *A.* and of his father, and to the circumstances of the estates, and *A.*'s interest in them.—*Aldborough (Earl) v. Trye*, 7 Cl. & F. 436.

2. The employment of counsel as confidential legal adviser, disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continues to operate.—*Carter v. Palmer*, 8 Cl. & F. 657.

C. a barrister, who had been for

SECURITIES—*continued.*

several years confidential and advising counsel to *P.*, and had, by reason of that relation, acquired an intimate knowledge of his property and liabilities, and was particularly consulted as to a compromise of securities given by *P.* for a debt which *C.* considered not to be recoverable to the full amount, purchased these securities for less than their nominal amount, without notice to *P.*, and after ceasing to be his counsel:

Held, that *C.*'s purchase, while the compromise proposed by *P.* was feasible, was in trust for *P.*; and that *C.* was entitled only to the sum he had paid, with interest according to the course of the Court.—*Carter v. Palmer*, 8 Cl. & F. 657.

3. A security, given for the payment of a bill, which has existence only through a fraud, cannot be made available by the supposed holder of the bill, though he may be untainted by the fraud to which it owes its origin, but he must rely on the bill alone, and can derive no benefit from the fraudulent security. — *Smith v. Kay*, 7 H. L. Cas. 750.

SEQUESTRATION. *See* PRACTICE.

SETTLEMENT. *See* MARRIAGE SETTLEMENT. WILL.

1. A husband, by post-nuptial contract, after granting an annuity to his wife, bound himself, his heirs and executors, to pay her, or any person appointed by her, in writing, during her life; with or without the husband's consent, and whether she should survive or predecease him, and have issue or not, the sum of 3000 *l.*, or other lesser sum, as she should direct, at the first term of *Whitsunday* or *Martinmas* next after the husband's death, in case he should survive or predecease her without leaving issue of the marriage; or at the first of those terms after failure of the issue, in case she should survive, leaving issue of the marriage, or at any of the said terms after any of these events; so that no part of the said sum should be raised during the life of the husband, or the joint existence of the

SETTLEMENT—*continued.*

wife and the issue of the marriage : with proviso, that in case the wife should survive the husband and the issue of the marriage, and recover payment of the said sum, or any part of it, her annuity should suffer restriction equal to the interest of the sum recovered. The wife survived the husband, and died without having had issue, and without recovering or disposing of any part of the 3000*l.* :

Held, by the Lords (reversing the judgment of the Court of Session), that in the event which had happened, the 3000*l.* belonged to the wife's estate, and her personal representative was entitled to it from the husband's estate.—*Dill v. Haddington*, 8 Cl. & F. 168.

2. By the settlement made on the marriage of *E. M.*, the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was, "to such person or persons as at the time of her death should be her next of kin." *E. M.* died, leaving her husband and a child of the marriage, and her own father and mother surviving :

Held (affirming a decree of the Master of the Rolls), that the father, mother, and child of *E. M.* were equally her next of kin, and were entitled, under the limitation, to the 10,000*l.* in joint tenancy.—*Withy v. Mangles*, 10 Cl. & F. 215.

See *Jordan v. Money*, 5 H. L. Cas. 185 ; *Bullock v. Downes*, 9 H. L. Cas. 1.

3. The trusts of a term in a post-nuptial settlement of real estates were, after the decease of the husband and wife (the settlors), to raise 1000*l.* for the portion of every daughter and younger son, to be paid to the sons at the age of 21, and to the daughters at that age or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors, and not sooner ; and if any younger son died, or became an eldest son or only son before 21, or any daughter before that age unmarried, or before his or her portion became vested, the portions provided

SETTLEMENT—*continued.*

for such son so dying, &c., and such daughter so dying, &c., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable. Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death, before his or her portion became due and payable ; and a trust, after the death of the settlors, for maintenance of such sons and daughters, or their issue, entitled to portions as aforesaid, until his or her portion became payable, with *cesser* of the term on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors. The settlors had seven children (besides an eldest son), four of whom died in the lifetime of their parents, under the age of 21, and unmarried :

Held, by the Lords, reversing a decree in Chancery, that the three survivors were entitled to have the portions of the four deceased children raised for them, in addition to their own.—*Evans v. Scott*, 1 H. L. Cas. 43.

4. *A.*, by a trust settlement, gave to his son "a like sum of 5000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced or may still advance for him, to enable him to carry on his business." *A.* entered into a guarantee for 2000*l.*, for the firm of which his son was a partner. *A.* was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend :

Held, that this was an advance to the son which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5000*l.*, after deducting the sum thus advanced.—*Berry v. Morse*, 1 H. L. Cas. 71.

SETTLEMENT—continued.

5. *Semble*, that an appointment, duly made, or a whole estate, to the uses of a marriage settlement, by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, passed the entirety of the estate.—*Farmer v. Farmer*, 1 H. L. Cas. 724.
6. The protector of a settlement giving his consent to a disposition of the settled property cannot be treated as a creator of such disposition.—*Braybrooke (Lord) v. The Attorney General*, 9 H. L. Cas. 150.
7. A marriage settlement gave a fund to trustees for *M. F.* (the intended wife) for life, and after her decease, as to one moiety for the husband, and as to the other moiety for the children, at such ages, &c., as the wife, notwithstanding her coverture, should appoint, and in default of appointment, among the children, as tenants in common, to be vested at 21 or marriage; and if there should be no child, as to the whole, for the husband for life; and after his decease for any person *M. F.*, notwithstanding her intended or any future coverture, might appoint; and in default of appointment, "for the person or persons who, at the decease of *M. F.* should be of her blood and in kin to her, and who, in their own right, or in right of their representatives, would have been entitled to the same under the Statutes for Distribution, in case the said *M. F.* had died possessed thereof *intestate and unmarried*." The wife died with her first child, which survived her only one day. She had not exercised the power of appointment:

Held, that "unmarried" in this settlement meant being without a husband at the time of death, that consequently the fund went to the child, as the wife's next of kin, and on its death passed to its father.—*Clarke v. Colls*, 9 H. L. Cas. 601.

8. Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term.

SETTLEMENT—continued.

The intention of the parties creating the portions is to govern.—*Massy v. Lloyd*, 10 H. L. Cas. 248.

If the principal is not raiseable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words.—*Id.*

Lord *Cottenham's* observations on this point (*Milltown (Lord) v. Trench*, 4 Cl. & F. 307-8) adopted.—*Id.*

There is a distinction between the word "payable," when used in speaking of a sum payable to a beneficiary, and when used in speaking of a sum payable by a trustee.—*Id.*

In a marriage settlement the estate was given to trustees on trust to pay the rents to the wife for life; to raise by sale or mortgage a sum of 10,000*l.* for a child of the wife by a former marriage, and also a sum of 500*l.* for a relative of the first husband; then, after the death of the wife, to pay 1000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at 21 or marriage, and until such portion should become payable, to raise money for the maintenance and education of the children, as the wife should deem meet, not exceeding, &c.: Provided, that if there should be no younger child, or it should die before 21 or marriage, 5000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained 21, and married in 1824. The father died in April, 1859. The Court of Chancery in *Ireland* had held that the principal sum of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage. The decree of the Court of Chancery was reversed, and the cause remitted, with directions that interest did not become payable till the death of the father.—*Id.*

SET OFF. *See* PLEADING. PRACTICE.

Innes, consignee of a *West Indian* estate, was appointed trustee thereof by *B.*, the tenant for life, for the purpose of keeping down incumbrances. *Innes* was also private agent and banker for *B.*, with the understanding that *B.* was not, nor were his funds, to be liable for advances made by *Innes* for the estate. *Innes* becoming embarrassed, was declared bankrupt, and assignees were appointed:

Held, by the Lords, reversing orders of the Court of Chancery on a bill filed by *B.*, and the other owners of the estate, to remove *Innes* from the possession and management, that a sum found due from *Innes* to *B.* on their private dealings might be set off against a sum found due to *Innes* in respect of his advances and payments for the estate.—*Baillie v. Edwards*, 2 H. L. Cas. 74.

SHARES IN JOINT-STOCK COMPANY. *See* ARBITRATION. COMPANY. FRAUD.SHEALINGS. *See* BOUNDARIES, 1.SHERIFF. *See* PRACTICE. RAILWAY SUIT IN EQUITY, 1. TROVER.

1. *H.* gives a *fi. fa.* to a sheriff to be executed against the goods and chattels of *D.*, and points out some cattle on the lands of *D.* as being the property of *D.*, when in reality they were not; and upon this representation the sheriff takes them in execution. The real owner sues the sheriff and recovers, and the sheriff sues *H.* for his damages and costs incurred through the misrepresentation. Judgment in the Courts of Exchequer and Exchequer Chamber for the sheriff, affirmed by the Lords.—*Humphries v. Pratt*, 2 Dow & C. 288.

[*Note.*—Soon after the decision of this case, which took place on a day not previously appointed for the purpose, Lord *Tenterden* incidentally notified on the Court of King's Bench, that the ground of this judgment was, that a sheriff is a public officer, and as such liable to an action if he refused to execute the writ.—*MS. note of Mr. Dow.*]

SHERIFF—continued.

2. Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he may sell them under a writ of estreat in chief or in aid, tested after the seizure under the *fi. fa.*, and may satisfy the Crown's debt, without regard to the previous execution.—*Giles v. Grover*, 1 Cl. & F. 72.

3. An Act of Parliament authorised a railway company to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act; and by the section of the Act for settling differences between the company and owners and occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should *not agree* with the company as to the amount of purchase money, or should refuse to accept such purchase money as should be offered by the company, or should, for 21 days after notice to him in writing, neglect or refuse to treat, or should *not agree* with the company for the sale of his interest, &c., the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands; and the sheriff should give judgment for such sum.

The company issued a warrant, purporting to be pursuant to the powers given by the Act, and requiring the sheriff to summon a jury to assess the value of the plaintiff's lands, &c. The jury was summoned, and assessed the value; the owner of the land attending, and protesting that the company had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded, purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularised in the warrant, and authorised by the Act to be taken for the railway, whereupon the sheriff in pursuance of the Act, gave judgment for that sum." Neither the warrant nor inquisition

SHERIFF—continued.

stated that the owner had refused to treat, or had not agreed with the the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given; but it appeared *abunde* that he did not agree with the company, and that he had received the requisite notices in which and in the warrant the property was particularised:

Held, that sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury.—*Taylor v. Clemson*, 11 Cl. & F. 610.

4. Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having, at the same time, duties to perform towards those against whom such writs are directed.—*Hooper v. Lane*, 6 H. L. Cas. 443.

If the sheriff having two writs in his hands, one valid the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainers any number of valid writs which he may then have, or which may afterwards come to to his hands.—*Id.*

But if having two such writs he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ.—*Id.*

Nor can he while a person is unlawfully in his custody, by virtue of an arrest on an invalid writ, arrest that person on a good writ. To permit him to do so would be to allow him to take advantage of his own wrong.—*Id.*

H., a sheriff had in his office a valid writ against *B.*, at the suit of one *L.*, but had not himself granted any warrant upon it. *H.* had also in his hands a writ against *B.*, at the suit of *A.*, which was invalid for want of signature by the proper officer of the Exchequer, the Court out of which it issued. *H.* had granted a warrant on this writ, and *H.*'s bailiff arrested *B.* upon it. *B.* went before a judge, claiming to be discharged. The bailiff opposed this application, and, having obtained a warrant on

SHERIFF—continued.

L.'s writ, also claimed to detain *B.* on that writ. The judge discharged *B.*, who then left the country. In an action by *L.* against *H.* for neglect, the judge told the jury that it was a question of fact whether *H.* had been guilty of culpable neglect in arresting upon *A.*'s invalid writ; and that if *H.* knew, or by reasonable care might have discovered that *A.*'s writ was void, it was culpable negligence:

Held, affirming the judgment of the Court below, that this direction was right.—*Hooper v. Lane*, 6 H. L. Cas. 443.

SHIP. See CONTRACT. INSURANCE. LIEN.

1. A Scotch ship was repaired at Hull. The bill was made out to "Captain Cowan (the master), and owners of the ship *Jeanie*." It was sent to the ship's agents for payment, but payment was not demanded for months. The agents received payment from the owners, but did not make payment to the persons who had repaired the ship:

Held, that the latter were entitled to claim the amount from the owners.—*Stewart v. Hall*, 2 Dow, 29.

2. Where the owner of a ship appointed *G. B.* to the command, and agreed that he should proceed to *Calcutta* and return to *London*, and that he might make intermediate voyages, paying a certain sum in consideration thereof; and the owner farther agreed to supply the ship with stores, in consideration of which *G. B.* agreed to take the command, and receive the ship into his service, for 12 months certain, or for such time as would be necessary to complete the voyage, paying at a certain rate per ton per month for the ship:

Held, that although *G. B.* was farther bound by the agreement to remit the freight bills to *London* as security, and that such bills were to be vested in trustees, who were to receive the freight, and hand over the surplus to him, and although the owner was to have an agent on board who was to have the sole

SHIP—*continued*.

management of the stores, and to have power to displace *G. B.* for breach of any covenant in the charterparty, and appoint another commander, *G. B.* was the owner of the vessel during the continuance of the charterparty, and was, as such, alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage.—*Colvin v. Newberry*, 1 Cl. & F. 233.

See *Erichson v. Barkworth*, 3 H. & N. 611-897; *Dalyell v. Tyrer*, E., R., & E. 903; *Schuster v. McKellar*, 7 E. & B. 720; *Sandeman v. Scurr*, L. R., 2 Q. B., 96.

3. A master of a ship has no lien on the ship or freight for wages, or for any expenditure he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent, where he makes a special contract, in itself *ultra vires*, in order to fulfil which, he incurs special expenses: if the owner adopts the benefit of that contract, he must, in equity, also bear its burthens. Where, therefore, the master of an ordinary seeking ship entered into a charterparty, under seal, to carry troops from the *Mauritius* to *England*, and stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the *Cape of Good Hope* entered into another charterparty, not under seal, to a similar effect, and made the specified alterations, and paid money, and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed:

Held, that in equity, the master was first entitled out of the freight earned under these charterparties, to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight, after deducting these charges. (*Diss. Lord Wensleydale* and *Lord Chelmsford*).—*Bristow v. Whitmore*, 9 H. L. Cas. 391.

SIMONY. See ADVOWSON, 2. CONTRACT.

Bargain and sale of a next presentation, the incumbent, to the knowledge of both parties, being in *extremis*, but without the privity of, or view to the nomination of, any particular clerk:

Held, by the House of Lords, reversing decisions of the Court of Great Sessions of *Chester*, and of the Court of King's Bench, that this is not simony so as to entitle the Bishop to reject the clerk subsequently presented.—*Fox v. Chester (Bishop)*, 1 Dow & C. 416.

SLANDER. See DEFAMATION. LIBEL.

SOLICITOR. See ATTORNEY AND CLIENT. INTEREST. PRACTICE. PRINCIPAL AND AGENT.

SOVEREIGN. See FOREIGN SOVEREIGN. WILL.

The Sovereign cannot dispose of the demesne lands of the Crown by will.—*Attorney General v. Dean, &c. of Windsor*, 8 H. L. Cas. 369.

SPECIFIC PERFORMANCE. See ADVOWSON. CONTRACT. PLEADING. PRACTICE.

1. Bill against three defendants for specific performance of an agreement entered into between the ancestor of the first defendant and the ancestor of the plaintiff. The ancestor of the plaintiff had devised her real and personal estates to the second defendant, but, as this defendant alleged, not beneficially, but only in trust, for the benefit of the plaintiff's family. The defendant's deposition as a witness was received in the suit:

Held, that it was improperly admitted.—*Chadwick v. Bradshaw*, 2 Dow, 331.

The Court below, on the whole case, came to the conclusion that the second defendant's interest was not that of a mere trustee, but of a devisee beneficially entitled, and made a decree directing the first defendant to convey the property to him:

Held, that this decree was erroneous in form, for if the plaintiff had no title to ask for specific performance, his bill ought to have been dismissed; but that the decree was

SPECIFIC PERFORMANCE—*continued.*

right in substance, since the liability of the first defendant to make the conveyance was established; and the plaintiff was entitled to the benefit of this decree.—*Chadwick v. Bradshaw*, 2 Dow, 331.

2. A bill for specific performance of an agreement made at a particular period, to grant a lease for lives, can only be sustained on the original agreement, and with reference to the circumstances as they then existed, and not with reference to a different state of circumstances occurring afterwards, though partially acted on by both parties. — *Wheeler v. D'Esterre*, 2 Dow, 359.

A. and B. in 1782, entered into an agreement, by which A. was to grant to B. a lease for three lives, at a rent of 1*l.* 15*s.* per acre. No lives were then named; nor was there any stipulation as to who should name them. B. entered and made considerable improvements. In 1785, the rent was reduced to 1*l.* 10*s.* an acre. In 1786, B. named the three persons (one of whom was in fact not then alive, and had not been alive in 1782), and all were approved of by A., who, however, constantly postponed the execution of the lease. In 1796, B. filed a bill for specific performance:

Held, that the bill could not be sustained, for that the lives had not been named in 1782 when the agreement was made, nor had there been any stipulation as to naming them; that when named, one of them was not then in existence, nor had he been in existence in 1782; that an agreement for a lease for lives must be understood to mean lives in existence at the time; that the improvements made after 1782 and before 1786, could not give effect to the approval of the lives then named, but that if they could, the agreement must then be understood as that of 1786 and not that of 1782, that the two agreements were in substance different from each other, and that the bill being founded on that of 1782 alone, it was not supported by the proof in the cause.—*Id.*

See *Kensington v. Phillips*, 5 Dow, 61; *Pritchard v. Ovey*, 1 J. & W.

SPECIFIC PERFORMANCE—*continued.*

396; *Vickers v. Vickers*, L. R., 4 Eq., 535.

3. Specific performance of an agreement refused on grounds of want of mutuality, of laches, of misapprehension as to the nature and effect of the agreement, of inequality, of improvidence, &c.—*Hamilton v. Grant*, 3 Dow, 33.

4. Bill in 1805 for performance of an agreement made in 1761 for sale of lands, and decreed accordingly below; but the decree reversed in Dom. Proc. Defendant having been left in possession as owner for a long time, and plaintiff having done acts inconsistent with the notion of his being himself owner, which was considered as amounting to a waiver. — *Rosse (Earl) v. Stirling*, 4 Dow, 442.

5. A person who purchases a farm which he knows to be subject to an existing agreement between the vendor and another person, though he does not see the agreement till long after the purchase, will be decreed specifically to perform its stipulations.—*Kensington (Lord) v. Phillips*, 5 Dow, 61.

A. in 1800, agreed in writing to grant B. a lease of a farm for three lives, the lives not being then named. B. entered into possession and occupied. C. purchased the farm from A. subject to the agreement, and received rent from B. for a few years, but upon being required to grant a lease according to the terms of the agreement, refused to do so. On a bill by B. for specific performance, naming the lives of B.'s children:

Held, that C. was bound specifically to perform the agreement.—*Id.*

See *Pritchard v. Ovey*, 1 J. & W. 396; *Fitzgerald v. Vicars*, 2 Dru. & Wal. 298.

6. A., a shareholder in a theatre, entered into an agreement with B., C., and D., three other shareholders, by which the theatre was to be leased to them at a certain rent. He subsequently filed a bill against them for specific performance, on which they proved that another agreement, of which they had before had no notice, had been entered into some years previously between A. and other parties

SPECIFIC PERFORMANCE—continued.

his then co-shareholders in the theatre, and that the earlier agreement contained conditions incompatible with the performance of that into which they had entered; they also proved that two transactions with regard to the letting of boxes had not been truly represented to them. The Vice Chancellor held, that as the theatre received in substance the benefit represented to accrue from these lettings, the misrepresentation as to mere form was no bar to A.'s claim for a specific performance. The Lord Chancellor reversed that decision, and the reversal was held right by the House of Lords.—*Harris v. Kemble*, 2 Dow & C. 463.

7. On the marriage of *T. P.* a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave *T. P.* an estate for life, and contained the following power of leasing: "It shall be lawful for *T. P.* and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. *T. P.* granted a lease to *A. P.* at a farm-rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heirs and assigns, would, on the payment of 5*l.* as a fine upon each life that should happen to die, add, to the time and term of the lease, the life of another person nominated by the lessee, from time to time successively for ever:

Held, that this lease was not warranted by the power; and a decree by the Court of Chancery in *Ireland*, ordering specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed with costs.—*Clark v. Smith*, 9 Cl. & F. 126.

8. The appellant having claimed to be a partner with one *Paynter* in gas works, which the latter had erected,

SPECIFIC PERFORMANCE—continued.

and was about to sell to the *East London Gas Company* then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that *Paynter* should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that *Paynter* should hold shares for the appellant to the value of 2000*l.*, for two years. The company having been formed, and having purchased the gas works from *Paynter*, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before that decree was made, the company was dissolved, and the gas works were sold to the *Ratcliff Gaslight and Coke Company*. The appellant then filed a new bill against *Paynter*, the *Ratcliff Company*, the directors of the dissolved company, and the assignees of *Paynter* (who had become bankrupt), to establish a lien upon the gas works, for what should be found due to him under the former decree, as well to carry out the former decree against all these parties:

Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas works by *Paynter* to the *East London Company* was authorised by appellant's agreements, that he had no just claim against the company, or lien on the property, and that the supplemental bill was properly dismissed with costs, as against all the defendants, except *Paynter* and his assignees.—*Pinkus v. Ratcliff Gaslight and Coke Company*, 1 H. L. Cas. 309.

9. Where an Act creating a railway company, or giving new powers to an existing company, authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes: if he does not know of any intention to misapply the funds of the company, but acts *bonâ fide* in the matter, he may enforce performance of the contract.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

SPECIFIC PERFORMANCE—*continued*.

10. Promoters of a company proposing to make a line of railway, or persons standing in a similar situation as directors of an existing company applying to Parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the proposed line, should the bill pass, and when it has passed, such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.

Secus, where the contract is in itself illegal, and Parliament is to be asked to legalise it.—*Id.*

11. Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their Bill, enter into a contract with him, in which the stipulation is, that the contract is to be performed by the company after the company shall have obtained an Act of Incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation.—*Preston v. Liverpool, &c. Railway*, 5 H. L. Cas. 605.

12. A. purchased an advowson. The living itself was subject to a mortgage to the governors of Queen Anne's bounty for money advanced to repair the parsonage house. The existence of this mortgage on the living was not communicated to the purchaser of the advowson, who discovered it after the arrangements for the purchase had been made; no fraud, or wilful concealment, or misrepresentation was charged:

Held, that he was not entitled to compensation in respect of this mortgage, which was a charge upon the living, but not upon the advowson, and that the purchaser was bound specifically to perform his contract.—*Wood v. Majoribanks*, 7 H. L. Cas. 806.

13. A contract, for valuable consideration, to transfer future property, must be such as is capable of being

SPECIFIC PERFORMANCE—*continued*.

the subject of a decree for specific performance in order to have the effect of passing the property at once.—*Holroyd v. Marshall*, 10 H. L. Cas. 191.

SPORTING. *See* GAME.

The right of hunting, shooting, &c., is an interest in the realty, and a grant of it is a license of a *profit à prendre*.—*Ewart v. Graham*, 7 H. L. Cas. 331.

This right was in the owner of a manor. There was no right of free warren in the manor. An Act of Parliament, reciting that "there is within and parcel of the said manor a certain stinted pasture, called *Bailey Hope*," that J. G., as lord of the manor, was owner of the soil thereof, and was "entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges, in and over the same," that he and all the owners of tenements thereon, were entitled to cattle-gates and rights of turbary thereon; and that for the purposes of improvement it was desirable to allot the stinted pasture, in severalty, among the persons entitled to the cattle-gates, enacted that it should be so allotted; and made each allotment "freehold to all intents and purposes," but provided that nothing therein contained shall prejudice, &c., the rights, &c., of J. G., his heirs and assigns, lords of the manor of N., to any seignories, &c. belonging to such manor: "but that the said J. G., his heirs and assigns, shall and may at all times hereafter enjoy all rents, services, &c., and also all right of hunting, shooting, fishing and fowling, on, through, and over the said stinted pasture, and every part and allotment thereof, and all other seignories, royalties, and privileges, to the lord of the said manor of N., for the time being, incident or belonging (other than those declared to be barred by this Act), in as full a manner as if this Act had not been passed:

Held, that this proviso did not apply to mere manorial rights, but that the exclusive right of hunting

SPORTING—*continued.*

and shooting over the allotments was thereby reserved to *J. G.*—*Ewart v. Graham*, 7 H. L. Cas. 331.

(*Greathead v. Morley*, 3 Man. & Gr. 139, questioned.)

STAIRCASE. *See* CORPORATION, 2.STAMP. *See* SUCCESSION DUTIES.

1. *W. M.*, and others, bound themselves by bond, jointly and severally, to pay to the Bank of Scotland, such sums as should be drawn out by *W. M.*, or be due from him, on a cash credit opened by the bank, in his name; and the certificate of the bank accountant was to be held sufficient to ascertain the balance due, and to warrant execution of law for such balance (not exceeding 5000*l.*) against the obligors. *W. M.* drew on the bank, by orders written on unstamped paper, payable to bearer, and though these drafts purported to be issued in the town where the bank was situated, they were in fact drawn and issued at a place more than 10 miles distant, and were also post-dated, and the bank agent knew that they were wrong in point of place and time. *W. M.* having become insolvent, was found to owe to the bank, on the cash credit account, upwards of 4000*l.*, as certified by the bank accountant, and for that debt the bank put the bond in suit against his co-obligors:

Held, by the Lords (reversing the decree of the Court of Session), that no obligation arose on the bond to pay any balance alleged to be due on drafts so drawn and issued, contrary to the provisions of the Stamp Act, 55 *Geo.* 3, c. 184, s. 13, which, in addition to penalties on the parties offending declares, moreover, that a banker, &c., knowingly taking such draft or order, shall not be allowed any money paid on such drafts in account against the drawer or his representatives.—*Swan and Others v. Blair*, 3 Cl. & F. 610.

2. Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given

STAMP—*continued.*

in evidence to show the agreed state of accounts only, though it has not been previously stamped. Its admissibility under such circumstances is restricted to this extent; so far as it relates simply to prove the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way.—*Matheson v. Ross*, 2 H. L. Cas. 286.

In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. In an action for work and labour, this paper was offered in evidence by the defendant, not for the purpose of proving that the sum, 68*l.* 9*s.* 4*d.*, had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time:

Held (reversing an interlocutor of the Court of Session), that it was admissible for that purpose.—*Id.*

STATUTE. *See* HEADINGS OF CLAUSES.

[For Statutes which have been the subjects of Special Decisions, see particular Headings, and a general Table at the end of the Index.]

1. By the Judges:—The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature.—*Sussex Peerage Case*, 11 Cl. & F. 85.
2. The 56 *Geo.* 3, c. 87, is repealed by the 1 & 2 *Vict.* c. 37; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions in Ireland.—*O'Connell v. The Queen*, 11 Cl. & F. 156.

STATUTE—continued.

3. Clauses in Acts empowering companies to levy a charge upon the public, as in Railway Acts, for example, must, where the meaning is doubtful, be construed favourably for the public. — *Stockton and Darlington Railway v. Barrett*, 11 Cl. & F. 590.

4. In construing an ordinary Act of Parliament, every word must be understood according to its legal meaning, unless the context shows that the Legislature has used it in a popular or more enlarged sense; but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a larger or more popular sense, must plainly appear. — *Stephenson v. Higginson*, 3 H. L. Cas. 638.

5. An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer; but will do so, if it appears to have been the intention of the Legislature that the two rights should not exist together. — *O'Flaherty v. Macdowell*, 6 H. L. Cas. 142.

The Irish statute, 33 Geo. 2, c. 14, is repealed, so far as joint-stock banks in Ireland are concerned, by the Imperial statute 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other. — *Id.*

6. Prohibitory statutes must not be interpreted on principles of tendency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. — *Philpott v. The President, &c., of St. George's Hospital*, 6 H. L. Cas. 338.

7. *Semble*, in discussing the construction of a statute, its title is not to be considered. — *Jeffries v. Alexander*, 8 H. L. Cas. 603, note (h).

SUBJACENT AND ADJACENT SUPPORT. See MINES. RAILWAY.

SUCCESSION DUTY (16 & 17 VICT. c. 51).

1. The Succession Duty Act is not to be construed according to the technicalities of the law of *England* or *Scotland*, but according to the popular use of the language employed. — *Braybrooke (Lord) v. The Attorney General*, 9 H. L. Cas. 150.

A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his "predecessor." — *Id.*

Devise in 1796 of certain freehold estates to A. for life, remainder to his eldest son B. for life, remainder to the first and other sons of B. in tail male. In 1841, A. being then tenant for life in possession, A. and B. executed a disentailing deed, to which two other persons were parties as trustees, and granted to the trustees, to hold, subject to the life estate of A., to such uses as A. and B. should appoint, and in default, if B. should survive, to such uses as he should appoint, and in default to B. for life, and to his first and other sons in tail male. In 1850, by another deed, which recited the former, and by which A. brought new estates into settlement, and discharged all the estates from a charge of 10,000 £, and B. gave up advantages to which he was entitled, an annuity to B. during the life of A. was charged upon all the premises, and subject thereto, they were appointed to A. for life, remainder to B. for life, remainder to the use of his first and other sons in tail male:

Held, affirming the judgment of the Court below, that these deeds must be taken as having been executed on the same day, that they constituted (*diss.* Lord Wensleydale) within the 12th section of the 16 & 17 Vict. c. 51, a disposition made by B. in favour of himself, and made out of the estate to which he was entitled under the will of 1796, that consequently his "succession" must be treated as happening under that will, and he was liable thereupon to

SUCCESSION DUTY—continued.

the amount of duty chargeable in respect of his succession to the testator on a disposition made under it by himself. — *Braybrooke (Lord) v. The Attorney General*, 9 H. L. Cas. 150.

And (*diss. Lord Wensleydale*) the nature of the consideration upon which the disposition was made did not affect the question.—*Id.*

The annuity, according to the terms of its creation, ceased on the death of A., at which time B. entered into possession of the estates :

Held, varying the judgment of the Court below, that he was entitled under the 38th section of the Act, to an allowance as on account of property of which he had been "deprived," within the meaning of that section.—*Id.*

See *Attorney General v. Lilford (Lord)*, 3 Hurl. & C. 252 ; L. R., 2 H. L., 67 ; *Attorney General v. Upton*, 4 Hurl. & C. 341.

2. A. in 1776 devised certain estates to his son H. for life, with remainder to the first and other sons of H. successively in tail male. In 1810, H. and his eldest son W. J. executed a disentailing deed, and then resettled the estates to such uses as H. and W. J. should jointly appoint, in default to H. for life, remainder to such uses as W. J. should appoint, in default to the uses limited by the will of A. In 1821 H. and W. J. executed a joint appointment (of the previously settled estates, and also of some now first brought into settlement by H.) to such uses as they should jointly appoint, then to H. for life, remainder to W. J. for life, remainder to the first and other sons of W. J. in tail male, remainder to the use of G. and E. (two brothers of W. J.) successively in tail male. No other appointment was made. H. died ; W. J. entered, and died without issue. G. then entered, and by a deed executed in 1855 between G. and his eldest son E. G., the entail previously created was destroyed, and the estates were conveyed to a trustee for such uses as G. and E. G. should jointly appoint, and in default, to the uses of the settlement of 1821. An appointment was afterwards made, to

SUCCESSION DUTY—continued.

which G., E. G., and the respondent F. were parties, by which the estates were settled to such uses as G. and E. G. should jointly appoint, and in default, to trustees to pay an annuity of 800 l. to E. G. during the life of his father, then to G. for life, then to trustees to pay E. G. 4000 l. a year, remainder to the use of E. G.'s sons successively in tail male. Under powers reserved to the existing tenant for life in the deeds of 1821 and 1855, G. charged the estates with certain sums for the benefit of younger children. G. died, and the trusts then came into operation :

Held, that G.'s succession was liable to a payment of 3 l. per cent., his predecessor having been W. J. That E. G. took under his own disposition, on a succession likewise derived from W. J., and was liable to a duty of 3 l. per cent., and that G.'s younger children were also (as to some part of their interests) liable to a duty of 3 l. per cent., as deriving their succession from their brother, E. G. But as to certain estates newly bought into settlement by their grandfather H., they were held liable to a duty of only 1 l. per cent., and the account of the whole duty due from them was directed to be taken with reference to this allowance. — *The Attorney General v. Floyer*, 9 H. L. Cas. 477.

In taking the account of what was due from E. G., allowance was ordered to be made for the annuity of 800 l. charged upon the estates, the subject of his succession.—*Id.*

3. A., being seised of certain estates in fee simple by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail successively. A. had three sons, E., R. P., and C. F. In 1840, A. and his eldest son E. executed a disentailing deed, and conveyed the estates to such uses as they should appoint, and, in default, to the uses of the settlement of 1812. In the same year A. and E., on the intended marriage of E., appointed to the use of A. for life, remainder to E. for life, remainder (subject to certain provisions for

SUCCESSION DUTY—*continued.*

the intended wife and the younger children) to the first and other sons of the marriage successively in tail male, remainder to *R. P.* and *C. F.* successively in tail male. *E.* died in his father's lifetime, without issue. *A.* and *R. P.* then conveyed the estates to such uses as they should appoint, and in default, to the existing uses. They afterwards appointed to *A.* for life, remainder to *R. P.* for life, remainder to his first and other sons in tail male, with an ultimate remainder to *A.* and his heirs. *R. P.* died without issue. *A.* then died, and *C. F.* succeeded to the estate:

Held, that *C. F.* was liable to a duty of 3*l.* per cent. as on a succession derived from his elder brother.—*The Attorney General v. Smythe*, 9 H. L. Cas. 497.

4. The value of property for the purposes of the succession duty, under the 16 & 17 *Vict.* c. 51, is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase or diminution in the value of the property, after the succession accrued, was dealt with by the Legislature.—*The Attorney General v. Sefton (Earl)*, 11 H. L. Cas. 257.

No system of assessment or charge can be adopted which draws into the calculation of value a prospective or future benefit.—*Id.*

When therefore *A.* succeeded to land which, as alleged by the successor, and admitted in the information, had not for some years before the predecessor's death produced any annual income, and did not then produce any to the successor, but of which he afterwards sold part, he was held not liable to duty under the provisions of the statute in respect of the part sold.—*Id.*

Semble, per the Lord Chancellor (Lord *Westbury*): That property (not exempted under the statute), which at the time of the accrual of the succession produces no annual income, but which is capable of being sold in the market, and would fetch a price

SUCCESSION DUTY—*continued.*

there, can be assessed as upon an annual value, equal to interest at 3*l.* per cent. on the price that might then be obtained for it.—*The Attorney General v. Sefton (Earl)*, 11 H. L. Cas. 257.

Per Lord Wensleydale: "The beneficial enjoyment" mentioned in section 21, means no more than the enjoyment of the possessor in his own right, and for his own benefit, not as trustee for another.—*Id.*

Per Lord Chelmsford: The 39th section applies only "when the value of a succession shall not be ascertainable under any of the preceding sections."—*Id.*

Per Lord Chelmsford: The word "first" in the 45th section, applies only to such cases as those mentioned in the 23rd, 24th, and 25th sections, with respect to timber advowsons and leases.—*Id.*

SUIT IN EQUITY.

1. *A.* conveys (or assigns his interest in) lands to *B.* in consideration, among other things, that *B.* shall make or give a lease back again to *A.* of a half or portion of the lands, and in consideration also of a loan of 200 *l.* by *B.* to *A.* *B.* covenants to execute the lease accordingly, subject to the repayment of the 200 *l.* for which *B.* has a judgment. No lease actually made, but *A.* remains in possession of his portion upon his equitable title. *B.* lends farther sums of money to *A.* and obtains judgments for these sums, and then conveys the lands, and assigns the judgments to *C.* *C.* issues writs of *fi. fa.* on the judgments, and in 1781, procures a sale by the sheriff of *A.*'s equitable interest, and on ejectment brought on the demises of the purchaser, and of *C.*, *A.* is turned out of possession.

A. in 1782 files the bill in Chancery for relief, and execution of a lease to him according to the agreement, but from embarrassment in his circumstances does not farther prosecute the suit till 1801. No steps taken between 1782 and 1801 to dismiss the bill. In 1808 the bill dismissed below.

SUIT IN EQUITY—continued.

The decree of dismissal *reversed* by the House of Lords, for—1st, the right to a suit in equity is not a proper subject of sale by the sheriff under a *fi. fa.*, and the sale is a nullity; 2nd, the delay in prosecuting the suit is well accounted for, and no steps were taken to dismiss the bill; and at any rate the right to the lease does not rest merely on the covenant by the landlord to make it, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title. Therefore the principle of delay does not apply, and *A.* is still entitled to have his lease executed in terms of the contract; and has his relief in equity, without the necessity of resorting for redress to the Court, out of which the *fi. fa.* issued.—*Moore v. Blake*, 4 Dow, 230.

See *The King v. Abbott*, 3 Price, 178; *Cholmeley v. Clinton*, 2 J. & W. 179; judgment of the Master of the Rolls.

SUNDAY.

An apprentice to a barber in *Scotland*, bound by his indentures "not to absent himself from his master's business on holiday or week day, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's Sunday customers:

Held, by the Lords (reversing the interlocutor of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that that work and all other sorts of handicraft were illegal in *England* as well as in *Scotland*, not being work of necessity, or mercy, or charity.—*Phillips v. Innes*, 4 Cl. & F. 234.

SUPPORT, ADJACENT AND SUBJACENT. See MINES. RAILWAY.**SURETY.** See BOND. STAMP, 1.

1. Letter of guarantie to plaintiff by defendant, that *P. C.* shall "faithfully and honestly discharge any duty assigned to or trust reposed in

SURETY—continued.

him." Plaintiff upon receiving this, employs *P. C.* as his agent. Sufficient consideration appears on the face of the guarantie to bind the defendant. Plaintiff in an action against the surety, shows that he employed the agent first at *B.* and afterwards at *L.*, and that the agent when moved to *L.* was indebted to him in a considerable balance, and produces accounts which bear on the face of them that various sums remitted to the agent from *L.* were so remitted as the proceeds of sales made at *L.*:

Held, that the judge was not bound to direct the jury as matter of law, that they must consider the remittances from *L.* to be made in discharge of the balance due at *B.*, so as to relieve the surety from his liability, but that he was right in leaving the question to the jury on the whole matter in evidence. — *Lysaght v. Walker*, 2 Dow & C. 211.

2. The conduct of the principals, creditor and debtor, with respect to a money bond, will not affect the rights and liabilities of an innocent surety, who has not authorised them to deal with the bond in a particular manner. — *Walker v. Hardman*, 4 Cl. & F. 258.
3. A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's account, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment, by the employers, of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury that the concealment to be undue must be wilful and intentional, with a view to the advantages the employers were thereby to gain:

Held, by the Lords (reversing the judg-

SURETY—continued.

ment of the Court of Session), that the direction was wrong in point of law.—*Railton v. Matthews*, 10 Cl. & F. 934.

Mere non-communication of circumstances affecting the situation of the parties, material for the surety to know, and within the knowledge of a person obtaining a surety bond, though not wilful or intentional, or with a view to any advantage to himself, is undue concealment, and will release the surety.—*Id.*

4. A surety is not of necessity entitled to receive, without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact that immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due to the banker. If the surety intends to rely upon such a fact for his defence, as showing that there was a previous agreement between the banker and the customer to deal with the credit in a particular manner, to which had he known it he should not have consented, he must bring such a defence before the Court, by putting it on the record.—*Hamilton v. Watson*, 12 Cl. & F. 109.

5. A party joining as surety in a bond ought to be informed of the nature of the obligation, the name of the obligee, and the relation in which he stands to the principal obligor.—*Squire v. Whitton*, 1 H. L. Cas. 333.

M. induced *W.* to join him as surety in a bond for repayment of a loan, saying he only wanted time to realise securities, and he would hold her harmless. *M.* and *S.* being trustees of a fund, sold it with consent of *B.*, the *cestui que trust*, and thereby raised

SURETY—continued.

the loan for *M.*, who informed *W.* that *B.* was the lender, but did not inform her how the loan was raised :

Held, that *B.* not being in fact the lender, his personal representatives had no privity of contract with, nor equities against *W.*, and that in consequence of the concealment from her of the real nature of the transaction, she was in equity altogether released from the bond.—*Squire v. Whitton*, 1 H. L. Cas. 333.

6. Though a creditor may not in every case be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud.—*Owen v. Honan*, 4 H. L. Cas. 997.

It is a general rule that a creditor may give time to a principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect.—*Id.*

7. The 5 & 6 Will. 4, c. 76, s. 58, required that the council of a borough should annually elect the treasurer of the borough. While that Act was in force, *D. M.* was elected treasurer of the borough of *Berwick* for "the year ending 9th November, 1842, if it should so long please the said council, but not otherwise." He gave bond with sureties for the due discharge of the duties of his office. The bond recited the election, and was conditioned for the due accounting by *D. M.* for all such monies, &c. "as I, the said *D. M.* shall or may recover, or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council, to the said office." After this bond had been given, the 6 & 7 Vict. c. 89, was passed. The 6th section of that Act repealed the 58th section of the previous statute, and directed that, instead of the treasurer being annually elected, he should "hold his office during the pleasure of the council for

SURETY—continued.

the time being." *D. M.* was re-elected in November, 1843, after the passing of this latter statute; no fresh bond was taken:

Held, that under the original bond, the sureties continued liable; that the election in November, 1843, was "a future election," within the true intent and meaning of the bond; and that *D. M.* did continue in the office of treasurer within the true intent and meaning of the said bond.—*Oswald v. Berwick (Mayor)*, 5 H. L. Cas. 856.

SURPLUS. See DEED OF GIFT. CHARITY. RESIDUE. TRUST.

In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others; secondly, that forfeiture will be incurred by non-performance of that condition; and thirdly, that the donee may be subjected to loss by its performance, are sufficient to raise the presumption that, in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase.—*Jack v. Burnett*, 12 Cl. & F. 812.

SURVIVOR. See WILL.**TENANT FOR LIFE. See ENTAIL. FRAUD. LEASE FOR LIVES. WILL.****TENANTRY ACTS. See IRISH TENANTRY ACTS. LEASE FOR LIVES.****THEATRE.**

A lease of the opera house contained a covenant on the part of the lessee, not to use the house for any but purposes of a theatrical kind, and to "use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year:

Held, that this was not a breach of the covenant, for that the covenant re-

THEATRE—continued.

ferred to improvements in the house itself, and did not bind the lessee to keep it open at a loss.—*Croft v. Lumley*, 6 H. L. Cas. 672.

TIME.

1. Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator.—*Parker v. Tootal*, 11 H. L. Cas. 143.

Where, therefore, there was a gift (after the happening of certain events amongst "my daughters and their children," the child of a daughter who had died before the date of the will was held not to be entitled to a share of the property thus devised.—*Id.*

2. The time for ascertaining the value of property for the purposes of the Succession Duty, is that at which by the death of the predecessor the interest of the successor first accrues.—*The Attorney General v. Sefton (Earl)*, 11 H. L. Cas. 257.

TIMBER. See SUCCESSION DUTY, 4.

1. Timber felled on a mortgaged estate, how to be treated in accounts. It is part of the property of the mortgagees, and the produce of it goes in discharge of the mortgage accounts.—*Morgan v. Leves*, 4 Dow, 29.
2. A clause in an indenture of lease reserving, out of the demise, to the lessor "all wood and underwood timber and timber trees, growing or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same," applies under the 23 & 24 Geo. 3, c. 39, only to trees standing when the lease was granted, and not to those afterwards planted by the tenant.—*Galwey v. Baker*, 7 Cl. & F. 379.

See *Mountcashell (Earl) v. O'Neill*, 5 H. L. Cas. 937; ante, AFFIDAVIT.

TITHES. See MODUS. PRESCRIPTION.

1. Where houses had formerly existed in respect of which rent was paid, but these houses had been pulled

TITHES—continued.

down, and buildings erected on the site, which buildings paid no rent, but were occupied by the owners of the land :

Held, that under the 37 *Hen. 8*, c. 12 (City of London Tithe Act), such buildings were liable to tithe in respect of their improved value.—*East India Company v. Antrobus*, 1 Dow, 464.

2. A party can only succeed in his suit *secundum allegata et probata*, and unless the case proved corresponds with the case laid, the suit cannot be supported, though the party makes out in evidence a case which might be a good one if it had been properly laid in the pleadings. And, therefore, where, in an answer to a bill for tithes, certain customary payments were alleged, and some payments, which, from their smallness, appeared to be customary, were shown in evidence, without making out the moduses as laid, the Court of Exchequer, without directing an issue to try the existence of any customary payments, decreed for the plaintiff, and the decree was affirmed by the Lords—*Blake v. Veysie*, 3 Dow, 189.

See *Byron v. Cooper*, 11 Cl. & F. 556.

3. Bill, by Vicar of *Sturminster Newton*, for vicarial tithes in kind against several occupiers of farms. Answers (separate) setting up farm moduses. Issues directed, and the issue respecting *Bagber* farm (*Bullen's*), tried. Proof for appellant *Bullen*, plaintiff in the issue, by the evidence of old persons that a sum of 5 *l.* 3 *s.* 4 *d.* had been invariably paid for the vicarial tithe of *Bagber* farm for about 60 years past. Offered in evidence for defendant (the vicar), to prove rankness, a rate paper, from which it appeared that the whole parish had, during the same period, paid rates in the same way in lieu of vicarial tithes, amounting together to 68 *l.* Offered also, certain entries, without date, but proved to be of the handwriting of the end of the 13th or beginning of the 14th century, in a book called the "Chartulary of *Glostonbury Abbey*:" viz.,

TITHES—continued.

an entry of the ordination of the Bishop on the appropriation of the church of *Sturminster* to the abbey ; and the entry immediately following, beginning with the words "portions of the church of *Sturminster* assigned to the vicarage to be ordained to remain in the same for ever," and then enumerating the several articles, with the value of each, without any allusion to a money payment in lieu of the tithes, and making the whole vicarage of the clear yearly value of 9 *l.* 12 *s.* 5 *d.* This entry was offered as a copy of, or extract from, the endowment, the original being lost. The book was produced from the muniment room of the Marquis of *Bath*, who had lands which had belonged to the abbey, but not in *Sturminster Newton*. Besides entries in which the abbey was concerned, the book contained several idle stories, and a great deal of other miscellaneous matter. The rate paper and Chartulary rejected, and verdict for the modus. But the Court of Exchequer, being of opinion that these documents ought to be admitted, ordered a new trial. Proof for appellant, as before, and the rate paper and entries in the Chartulary read for the respondent, besides other documents, to rebut the presumption of a modus. Verdict for respondent, and against the modus ; a new trial moved for on the ground of the alleged improper admission of the Chartulary in evidence, refused ; and appeal to the Lords from this order of refusal.

Objections to the admission of the entries :

1. That the book did not come from the proper custody.

2. That the endowment itself could have been no evidence on this issue ; and if it could, yet the entry respecting the portions assigned to the vicar did not purport to be a copy or extract, and was not good secondary evidence.

3. That this was *res inter alios acta*.

The order of the Court of Exchequer, refusing the new trial, affirmed by the House of Lords on the grounds :

TITHES—continued.

1. That the entries had been properly received in evidence, the custody being proper; the entries being authentic copies of instruments of which the originals would have been good evidence; and *res inter alios acta* being in this case no objection, and also that the whole of the rate paper was proper evidence on this particular issue.

2. That, supposing the evidence to have been improperly admitted, the verdict was warranted by the other evidence, and that it signified nothing to say that the jury might possibly have come to their conclusion upon the ground of the Chartulary, because the object of an issue out of equity was to satisfy the conscience of the Court; and where the evidence was such as fully to satisfy the conscience of the Court, a Court of Equity was not bound, either in tithe causes or others, to order a new trial, or to direct an issue originally at all; exercising, however, a sound discretion in each particular case, whether to do so or not.—*Bullen v. Michel*, 4 Dow, 297.

[On the trial of the case of *Doe d. Padwick v. Skinner*, at the *Exeter assizes*, in July, 1848, Mr. Justice Coleridge, speaking of this case, said: "There never was a greater imposition put upon a Court than there was in the production of that book. The book was bought at a stall for 1s., and sent to *Bath*, and it somehow afterwards found its way into the muniment room of the Marquis of *Bath*." In the course of the hearing of *Buller v. Michell*, before the House, Lord *Redesdale* had pointed out circumstances impeaching its value.—*Ex rel. counsel in Doe d. Padwick v. Skinner*.]

See *Short v. Lee*, 2 J. & W. 501; *Arnold v. Bath and Wells (Bishop)*, 5 Bing. 316; *Tucker v. Wilkins*, 4 Sim. 252; *Williams v. Wilcox*, 8 Ad. & E. 314; *Knight v. Waterford*, 3 Cl. & F. 270; *Meath v. Winchester*, 4 Cl. & F. 445; *Reg. v. Ledgard*, 8 Ad. & E. 535.

4. Where a person had a beneficial interest for life in an inappropriate rectory, and was in actual possession:

TITHES—continued.

Held, that he was entitled to take the tithes though the estate was subject to a trust term for securing annuities, and to a mortgage, he having paid the annuities and the mortgage money, and neither trustees nor mortgagees interfering with his possession.—*Glegg v. Legh*, 1 Dow & C. 98.

5. Bill by vicar for vicarial tithes; answer a modus in lieu of vicarial tithes without specifying more particularly the tithes in respect of which the alleged modus is payable. No sufficient evidence given of the vicar's title to all or any of the tithes which he claimed. The Lord Chief Baron, notwithstanding, directs an issue, in terms of the answer, to try the question of modus in lieu of tithes, affirmed by the Lords as being the proper issue.—*Denchfield v. Strong*, 1 Dow & C. 480.

6. The stat. 37 Hen. 8, c. 12, recited that differences existed between the inhabitants and the clergy of *London* respecting the payment of tithes, and that the said inhabitants and clergy "had compromised and put themselves to stand to such order and decree touching the premises as should be made by the Archbishop of Canterbury and several other persons therein named, for a final end and conclusion of the said differences for ever." Therefore it was enacted that such decree as should be made by the said Archbishop and others before the 1st day of March then next ensuing, of or concerning the payment of tithes, oblations, or other duties within the said city or liberties of the same, and enrolled in the King's High Court of Chancery, of Record, should stand and remain, and be as an Act of Parliament, and should bind as well all the said citizens as the said clergy, &c., for ever. The decree was made, but no enrolment of it in Chancery could be produced, though the decree appeared by a statement in the registry book of the See of *London* to have been given by the Archbishop to *Bonner*, the Bishop of *London*, to be kept in the registry of St. Paul's Cathedral. The appellant filed his bill against the respondent for an account of

TITHES—continued.

the tithes due from the respondent under this Act, and the decree therein mentioned. The respondent's answer denied the enrolment of the decree and its existence as a legal instrument. The Vice-Chancellor directed an issue to try whether the decree mentioned in and authorised to be made by the stat. 37 Hen. 8, c. 12, was duly enrolled according to the provision of that statute:

Held, that such issue was improper; and that after the Courts had repeatedly treated the decree as a binding instrument, and after the citizens had recognised it by the usage of paying tithes according to its order, the enrolment must be presumed. — *Macdougall v. Purrier*, 2 Dow & C. 135.

7. A custom to pay one-twentieth instead of the full amount of the tithes, though proved to be very ancient, cannot be supported by such proof alone, but must be shown to have had a legal origin. In a case where this proof of legal origin was wanting, the House of Lords, affirming a decree of the Equity Exchequer, held the tenants of the lands liable to account for the full tithes. — *Wilson v. Kensington*, 1 Cl. & F. 1.
8. A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green. — *Lewis v. Bridgman*, 2 Cl. & F. 738.
9. Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles the 1st. Still more ancient documents relating to the same parish, and among them the Ecclesiastical Survey of Henry 8 made no mention of such payment:
Held, that under these circumstances an allegation that such payment existed before the time of legal memory, was not supported. — *Graves v. Fisher*, 3 Cl. & F. 1.
10. Lord Fairfax, by a codicil to his will in the year 1671, gave all his tithes of *Bilborough* in fee (subject to an estate therein for the life of R. S.) to Henry Fairfax and his heirs and

TITHES—continued.

assigns, to the use of a preaching minister there, to be nominated by said H. F. and his heirs. The heir of H. F. conveyed the tithes, with other property, to trustees for sale, for payment of his debts, and they were accordingly sold and conveyed by the said trustees in 1716 to R. F. and J. H. and their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by R. F. and his heirs. J. H. (who was only trustee for R. F.) surviving R. F., became seised of the legal estate, and his descendants continued so seised in succession until 1826, when his heir-at-law conveyed the said tithes upon the original trusts to T. L. F. the heir of R. F. T. L. F. had, in 1721, nominated B. E. the preaching minister of *Bilborough*:

Held, in a suit by T. L. F. and B. E. for an account of tithes in *Bilborough*, that this was a valid nomination of B. E. — *Holdsworth v. Fairfax*, 3 Cl. & F. 115.

It appeared from the evidence, that the tithes of *Bilborough* had been appropriated to an alien priory, dissolved by stat. 27 Hen. 8; that Henry VIII. afterwards demised them for 21 years by the description of *omnes decimas garbarum et feni*; that Edward VI., by letters patent, granted them to H. and W. and their heirs, by the description of *omnes illas decimas garbarum, granorum, bladorum, feni, lanae et agnellozum ac alias decimas nostras quascunque*, &c., and that the title to them under that grant was vested in T. L. F. and his nominee. There was no mention of rectory or advowson in the grant. There was no trace of any endowment for a vicar or curate at any time in *Bilborough*:

Held, that the grant included the rectory, and comprised all tithes of every description arising in *Bilborough*, and the decree ordering an account of them to T. L. F. and B. E. was affirmed. — *Id.*

11. The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator.

From evidence of right to tithes of all kinds in a lay impropriator up to a given time, and of perception of the

TITHES—*continued.*

corn tithe since that time by another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned proprietor to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that and all other tithes from the presumed grantor.—*Andrews v. Drever*, 3 Cl. & F. 314.

12. Where a grant from the Crown of tithes of a manor which formed part of a rectory, was ambiguous in its terms, but it appeared that the Crown had been possessed of the rectorial tithes; that the Crown had granted all it possessed; that the grantees had, as such, repaired the chancel of the church, and that the occupiers of lands within the manor accounted to the grantees for some of the tithes payable in respect of such lands, the Court of Exchequer refused to allow the occupiers to set up the non-perception of the other rectorial tithes in answer to a bill filed for an account of tithes. Nor would it allow such non-perception to be admitted as proof either of exemption of the occupiers of the land from certain of the tithes claimed, or of the right of the vicar to the receipt of such tithes. And there being no other evidence offered, the Court decreed an account.—*The House of Lords affirmed the decree.*

The word "portionibus" is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish, and will not of itself be taken to have any other meaning. — *Scarlet v. The Governors of the Lutton School*, 4 Cl. & F. 1.

13. To a vicar's bill for an account of all small tithes, the defendants answered that the right to all tithes, as well small as great, became vested in the rector, and in the owners of the lands, by grants and conveyances, and that they and their tenants held the lands with the tithes, or free from all tithes whatsoever; but that some occupiers paid annually to the vicar, in respect of their houses, certain small sums in the name of

TITHES—*continued.*

"privy tithes," which the defendants alleged were personal tithes, and not compositions for small tithes. The vicar, unable to produce an endowment, gave secondary evidence, showing that the vicarage was endowed generally with small tithes. There was no evidence that any small tithes were ever paid to or claimed by the rector, or the persons entitled to the rectory:

Held, 1. That the defendants, after failing to show title to the small tithes in themselves, or the owners of the lands, could not be heard to say that the small payments in the name of privy tithes were compositions.—*Clee v. Hall*, 7 Cl. & F. 744.

2. That privy tithes are not personal tithes, but are the same as small tithes.

3. That where there is evidence that the vicarage was endowed with small tithes, the vicar's right to them is established against all lands within the parish as to which no particular discharge is proved; although no small tithes have ever been paid.

4. Where any of the defendants proved a particular discharge of the lands in his occupation, or showed they were originally part of the glebe lands, the vicar's bill against them was dismissed with costs, but without costs as to such defendants as did not make and prove that defence in the Court below.—*Clee v. Hall*, 7 Cl. & F. 744.

14. To a rector's bill against the owner and occupiers of land for an account of tithes, they, by their answers, set up an agreement, made in 1711, between the then rector and the owner of the lands (who was also patron of the living), by which certain lands and a perpetual annuity were given to the rector in exchange for his glebe lands, and for the discharge from tithes of the lands occupied by the defendants. The agreement continued to be beneficial to the church, having been made with reference to the probable future increase in the value of the tithes; it was approved by the ordinary, and established by a decree of the Court of Chancery, and acted on down to the filing of the bill, when the rector

TITHES—continued.

refused to accept the annuity, but still retained the lands which were allotted to him in the exchange, and which were much more valuable than the glebe lands :

Held, that although it was open to the rector to put an end to the agreement, as being void under the disabling statutes, he was not entitled to the aid of equity to enforce his legal title to the tithes while he retained part of the consideration for their discharge, contrary to the principle "that he who seeks equity must do equity."—*Plowden v. Thorpe*, 7 Cl. & F. 137.

Sc. afterwards in Exch. 14 M. & W. 520.

15. To a bill filed for tithes against occupiers of lands in July, 1833, the owner was made a defendant by amendment in January 1865. *Quære*, whether he was defendant to a suit commenced within the time limited by the Act 2 & 3 Will. 4, c. 100, s. 3, that is, within a year from the 17th of August, 1832.—*Plowden v. Thorpe*, 7 Cl. & F. 137.

16. A bill for an account of tithes was filed against five defendants before the expiration of one year from the date of the 2 & 3 Will. 4, c. 100, s. 3. This bill, after the expiration of that time, was amended under the order of the Court, and four other persons were allowed to be introduced as defendants :

Held, that the suit, as against those latter defendants, must be taken to have commenced at the date at which they were actually introduced into the bill ; that they could not, by relation backwards, be treated as defendants in the original bill, and that they were consequently entitled to the protection of the provisions of the statute.—*Byron v. Cooper*, 11 Cl. & F. 556.

A decree against all the defendants for an account, made in the Court below, was therefore reversed in this House ; and the bill as to the four defendants, ordered to be dismissed with costs here and in the Court below.—*Id.*

17. To a bill filed by the rector of *F.* for an account and payment of tithes, the defence was, that the lands occu-

TITHES—continued.

piated by the defendants comprised the manor of *F.*, which was within the rectory of *F.*, and that from time immemorial the owner for the time being of the manor had paid to the rector the yearly sum of 40*l.* for maintenance of Divine service there, for and in lieu of all manner of tithes arising within the manor : and that the owner for the time being of the said manor, or his assigns, had from time immemorial, in respect of the said yearly sum, used to have, and ought to have, the tenth of all titheable things arising within the said manor.

The evidence in the cause showed payments to the rector of 40*l.* yearly for upwards of 150 years, and pernaney of the tithes by the owner of the manor for upwards of 180 years previously to the filing of the bill ; and also that in the year 1686, a bill by the then rector of *F.* for the tithes of the manor, was dismissed upon the same defence :

Held, by the Lords (reversing a decree for the account) :

1. That as the account for tithes is merely incident to the rector's legal title, a Court of Equity could not interpose in his favour until he established his right at law.

2. That where a defence to a suit in equity for tithes raises a doubt as to the rector's legal title to them, the course of a Court of Equity is to retain the bill for a specified time, and leave the rector at liberty to establish his title by an action at law within that time.

3. That a party who mistakes his right, and sues in a wrong form, is not entitled to an order that would deprive the defendants of the benefit of any alterations made in the law in the meantime.—*Waterford (Marquis) v. Knight*, 11 Cl. & F. 653.

18. By the statute 37 Hen. 8, c. 12, the inhabitants of certain parishes in the city of *London*, therein mentioned, are to pay tithes at the rate of 2*s.* 9*d.* in the pound on their rent. By the 2 & 3 Vict. c. 95 (the *Blackwall Railway Act*), ~~the~~

TITHES—*continued.*

houses in any of these parishes (of which *St. Olave's Hart-street* is one), shall be taken for the purposes of the railway after the occupiers shall have quitted their houses, and "until new houses or other buildings shall be erected, and occupied, of such annual rent or value, that the tithes of such new houses shall be equal to the tithes payable for the houses quitted, the tithes, or payments in lieu of tithes, payable in respect of the houses quitted (according to the last assessments thereof to the 25th March, 1839), or annual sums of money equal to the loss in tithes which the rectors may sustain by the taking down of such houses, shall be paid and payable to the said rectors," &c. The company removed a great many houses, and built two others, which were at once occupied :

Held (reversing a decree of Vice-Chancellor *Wigram*), that the object of the Act was only indemnity to the clergy; that therefore the clergy were entitled to receive only what they would have received if the railway company had never interfered with the premises: that the company was liable to pay in respect of houses removed (where no others had been built in their places) such sums as were actually paid to the rector, whether by agreement or otherwise, up to the 25th of March, 1839; that the amount actually agreed upon between the rector and the occupant, and paid by the occupant, constituted the "assessment" within the meaning of the Act, and that the amount of compensation must be measured thereby; and farther, that where new houses had been built and occupied, the company was entitled to be credited (in reduction of its general liability to make compensation under the Act), with the sums which had become payable in respect of such new houses, and not merely with those which had been actually received therefrom.—*Blackwall Railway Company v. Lettis*, 3 H. L. Cas. 470.

TITLE BY INFECTMENT.

Two cases of adjudication, without infectment in the one case, in the other with infectment but without

TITLE BY INFECTMENT—*continued.*

any declarator of the expiry of the legal. The decret of adjudication was obtained in 1677, and that title was transferred to the *Athol* family in 1688. That family having thus got possession of the lands, obtained two Crown charters, the one in 1691, the other in 1725, including the lands in question, and held the peaceable and uninterrupted possession till 1803, when the title was challenged as depending only on the adjudication, and as being still redeemable, because in the one case it was not followed by infectment, so that by the law of *Scotland* prescription would not run; and because in the other, though followed by infectment, there was no declarator of the expiry of the legal :

Held, by the Court below, that the Crown charters and 40 years' possession formed a good title by prescription, and excluded all question on the subject. This decision affirmed above.—*Robertson v. Athol (Duke)*, 3 Dow, 108.

Semble, by Lord *Eldon* (Lord Chancellor), that an adjudication, with infectment, and 40 years' possession after the period of the expiry of the legal, though without a declarator, formed a good title by prescription, independent of the Crown charter.—*Id.*

TOLL.

1. A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, "not exceeding the sum of 4 d. per ton per mile." It then went on thus: "And for all coal which shall be shipped on board any vessel, &c., in the port of *Stockton-upon-Tees* aforesaid for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile":

Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll.—*Stockton and Darlington Railway v. Barrett*, 11 Cl. & F. 590.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in

TOLL—continued.

forming inclined planes on the line of railway, authorised them to demand, "for all articles, &c. for which a tonnage is hereinbefore directed to be paid, which shall pass any inclined plane upon the said railway, such sum as the said proprietors shall appoint, not exceeding the sum of 1 s. per ton":

Held, that this was a cumulative charge.—*Stockton and Darlington Railway v. Barrett*, 11 Cl. & F. 590.

Clauses in Acts empowering companies to levy a charge upon the public, as in Railway Acts for example, must, where the meaning is doubtful, be construed favourably for the public.—*Id.*

2. A liability to make compensation for actual injury done to an oyster bed situated in a navigable river, by anchoring thereon, is not to be confounded with a liability to toll for casting anchor in the soil itself.—*Gann v. The Free Fishers of Whitstable*, 11 H. L. Cas. 192.

TRADE AND TRADE MARKS. See CORPORATION.

A company purchased all the property, utensils, goodwill of business, and trade marks, &c., of a manufacturer; this purchase would authorise the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against infringement of the same. — *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523.

There may be a property in a trade mark, which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred:

Semble, a paper descriptive of a trade does not constitute a "trade mark." —*Id.*

Where an advertisement, or trade mark, states that which is not true, it cannot be made the subject of protection by the Court of Chancery.—*Id.*

Persons of the name of *Crockett* manufactured leather cloth, and put on it a stamp, describing it as manufac-

TRADE AND TRADE MARKS—continued.

tured by them at "*New Jersey, U.S., and West Ham, Essex.*" and as being patented and being tanned. The appellants bought their manufactured articles, their materials for manufacture, goodwill, and premises at *West Ham*, and their trade marks. *Semble*, that on such a purchase, the continued use by the purchasers of *Crockett's* original bill was not a fraud on their part, and if the use of it had been infringed, it might have been protected.—*Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523.

But where, in a stamp used by the defendants, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs that any person with reasonable care and observation must see the difference, and not be misled into taking the one for the other:

Held, that there had been no infringement.—*Id.*

TREASON. See PEERAGE.

1. One of the co-heirs to a barony in abeyance, was attainted of treason, and his heirs and descendants were restored in blood by Act of Parliament:

Held, that it is competent to the Crown to terminate the abeyance in favour of the heir of the person so attainted, or of the heir of any other co-heir, —*The Braye Peerage Case*, 6 Cl. & F. 757.

2. It is now established that an attainer of one co-heir to a barony in abeyance, does not affect the other co-heirs who do not derive through the attainted person; and also, that if his heir is restored in blood, the Crown may terminate the abeyance in him or his descendants.—*Beaumont Peerage*, 6 Cl. & F. 868.

3. An indictment charging a prisoner in *Ireland* with compassing, &c., to excite insurrection there, and to levy war, and to put the Queen to death, and charging as overt acts, assem-

TREASON—continued.

bling with others armed with weapons, to excite insurrection, and to levy war, is not an indictment founded on the 37 *Geo.* 3, c. 6, so as to entitle the prisoner under the statutes 7 & 8 *Will.* 3, c. 3, and 7 *Anne*, c. 21, to a copy of the indictment, and to a list of witnesses, to be delivered ten days before the trial.—*O'Brien v. The Queen*, 2 H. L. Cas. 465.

The 4th section of the 57th *Geo.* 3, c. 6, extends only to treasons made or declared by that statute.—*Id.*

Quere, whether the objection for the want of such copy and list is to be raised by plea on arraignment.—*Id.*

The offence of levying war against the King declared by the 25 *Edw.* 3, s. 5, c. 2, is high treason in *Ireland* by the effect of the *Irish* statute, 10 *Hen.* 7, c. 22, commonly called *Poyning's Acts*, by which acts which were treason in *England*, under the statute of *Edw.* 3, were made treason in *Ireland*.—*Id.*

TRIAL. See EXCEPTIONS. PLEADING. PRACTICE.

On *quo warranto* for exercising the office of alderman, defendant pleaded certain customs, and that *M. S.* being three times returned by the ward, and afterwards rejected as unfit by the mayor and aldermen, they elected and admitted defendant. The relator took issue on the existence of the custom, and replied that *M. S.* was fit for the office, upon which issue was joined :

Held, that the judge at the trial, after the jury had found the customs, properly discharged them, without consent of the parties, from giving a verdict on the issue as to the fitness of *M. S.* for the office of alderman.—*The King v. Johnson*, 6 Cl. & F. 41.

The question whether in fact goods were delivered to a carrier at the risk of the consignor or consignee, is a question for the jury.—*Dunlop v. Lambert*, 6 Cl. & F. 600.

Upon an issue whether certain defendants had wrongfully fished for salmon by means of stake nets placed in situations prohibited by statute, where the question was what was to be considered "river," and what

TRIAL—continued.

"sea," a direction that the thing to be looked to is the fact of the absence or the prevalence of the fresh water, though strongly impregnated with salt, is erroneous.—*Horne v. Mackenzie*, 6 Cl. & F. 628.

TROVER. See SHERIFF.

A sheriff (before the passing of the 6 *Geo.* 4, c. 16) having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *f. fa.* but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving however his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy :

Held, by the Lords (Lord Denman, diss.) that the assignees might maintain trover against the sheriff for the goods seized.

Semble, that the receipt of poundage was evidence of a conversion by the sheriff. — *Garland v. Carlisle*, 4 Cl. & F. 693.

TRUST AND TRUSTEE. See WILL.

A. held a lease as trustee ; while doing so the owner of the land advertised it to be let or sold. A. obtained a lease of the land for himself, expressly declaring at the time that he did not mean it to be understood that he was getting the lease for the *cestui que* trust. Above 20 years afterwards the *cestui que* trust filed a bill to have it declared that A. held the lease as a trustee for him :

Held, that A. did so hold it.—*Fitzgibbon v. Scanlan*, 1 Dow, 261.

Accounts were directed ; the person thus declared trustee ordered to account " for the rent received by any lease or demise *bonâ fide* made of the premises."—*Id.*

See *Mill v. Hill*, 3 H. L. Cas. 828, where under similar circumstances the person declared to hold as trustee was allowed an indemnity against covenants in the lease, and also repayment of improvements *bonâ fide* made by him in the premises.

See also *Cooper v. Phibbs*, L. R., 2 H. L., 149.

TRUST AND TRUSTEE—continued.

2. A trustee, tutor, and curator, appointed cashier and agent to the trust by co-trustees, and when called upon to account, produces accounts made up by accountants from his own instructions. Lord Ordinary appoints objections of a general and preliminary nature to be stated to the accounts, reserving the examination of particulars and vouchers till these should be disposed of. Objections given in that the accounts were not annually balanced; that interest was allowed only at 3½ per cent., whereas interest ought to have been calculated at 3 per cent. *de die in diem* from time of receipt till three months after the annual balance, and then, on the balance, at 5 per cent.; and the right to demand all the profits stated, but not insisted on; that a charge was made for the service of the accountants which ought to be paid by the trustee and agent, as it was by his negligence in not keeping the accounts himself that their services became necessary; that his charge for his own trouble in the management was excessive; and that a charge made for making up titles to certain lands by adjudications in implement, without general service and decree of constitution, ought not to be allowed, as the titles were improperly completed, and therefore useless. After several proceedings, final interlocutor below approving the accounts *in toto*, without any examination of particulars. This last interlocutor reversed as inconsistent with the reservation in the Lord Ordinary's, which was not appealed from, and the cause remitted for review as to the rest, so that the claim for all the profits might be insisted upon if that question was still open:

The Lord Chancellor (Lord Eldon), observing that he could not conceive how it came to be imagined that the accounts ought not to be annually balanced; that it was new in principle to take accounts made up under the directions of one alone of the parties as a ground for judicial proceeding; that the appointment of a trustee by co-trustees to be cashier and agent to the trust, to be paid as

TRUST AND TRUSTEE—continued.

cashier and agent, could hardly be supported in *England*; that a trustee ought to keep his accounts so regularly, at least, as to enable the Court to judge how far the assistance of professional accountants might be necessary in the particular case, but that a trustee acting *bonâ fide* with a view to the interest of the *cestui que* trust ought not to suffer for mistake unless he very grossly miscarried. — *Montgomery (Lord and Lady) v. Wauchope*, 4 Dow, 109.

See *Home v. Pringle*, post, 329.

3. *P.* and *B.* obtain a judgment in *Ireland* against *D.*, and issue a *fi. fa.*, under which his effects in his mansion house at *R.* are taken. Notice to the sheriff that *D.* had some years before conveyed his estates in the counties of *M.*, *R.*, and *W.* in *Ireland*, and of *O.* in *England*, and assigned his effects, including the goods in question, for a term, in trust for his creditors, and that the trustee was in possession, and the sheriff relinquished the goods. *P.* and *B.* file their bill, and obtain production of the trust deed, from which it appears that *D.*, under the deed, is entitled to an annuity or yearly rent out of all the estates of 5000*l.*

P. and *B.* sue out an *elegit*, directed to the sheriff of *R.*, who delivers to *P.* and *B.* lands in that county on which the annuity is charged, to the amount of a moiety of the annuity. But *P.* and *B.*, being advised that they could make nothing of this, on account of the trust, proceed with the suit in equity, and obtain an order restraining the trustee from paying any part of the 5000*l.* to *D.*, without reserving what had been found competent by the Court to answer the demand of *P.* and *B.*, till the hearing of the cause and farther order. From that order *D.* and the trustee appealed, but the order affirmed in *dom. proc.* — *Dillon v. Plaskett*, 1 Dow & C. 320.

4. Trust fund directed by the trustees and testator to be invested after his death in the purchase of lands, to be settled on certain persons mentioned:

TRUST AND TRUSTEE—*continued.*

Held, by the House of Lords, that after the period of 12 months from the time of testator's death, the interest of the trust fund, until it is invested in land, shall go to those who would be successively entitled to the rents and profits of the lands when purchased, this being a rule founded on the primary intent of the testator, and resting on principles common to the laws both of *England* and *Scotland*.—*Stair (Earl) v. Macgill*, 1 Dow & C. 24.

5. Where a fund is given to the members of a corporate body, as trustees for the maintenance of a school, if such fund is not given out and out, but only as the trustees may think best to apply it for the advantage of the school, the surplus, after satisfying the exact charge first created upon the fund, belongs to the trustees.—*Attorney General v. Brasen Noss College*, 2 Cl. & F. 295.

The manner in which the donor of the fund, who was the first trustee under the grant by which the school was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself.—*Id.*

See *Southmolton (Mayor) v. The Attorney General*, 5 H. L. Cas. 1; *Stephenson v. Higginson*, 3 H. L. Cas. 638; *Beverley v. The Attorney General*, 6 H. L. Cas. 315; *Attorney General v. Dean of Windsor*, 8 H. L. Cas. 388; *Attorney General v. Jesus College*, 29 Beav. 167.

- 6 Where A. held funds, part of the estate of B., but held them as security to cover liabilities into which he had entered on account of B., the estate itself being otherwise clearly answerable for such liabilities, and where the creditors of B. had not required him to invest the balance which might possibly exist after his liabilities had been indemnified:

Held, that in the absence of any positive stipulation he was not, on the final settlement of accounts with the creditors, bound to pay a larger interest than 5 per cent. on the money he had so retained; and the account was not to be taken with rests.—*Court v. Roberts*, 6 Cl. & F. 65.

TRUST AND TRUSTEE—*continued.*

Under such circumstances, if the fund had been paid into Court, it would have realised 4 per cent., with yearly or half-yearly rests, which being equal to 5 per cent. without rests, A. was held liable to that interest, on the equitable principle of putting the creditors into the same situation as if he had paid the fund into Court in the ordinary manner.—*Court v. Roberts*, 6 Cl. & F. 65.

Where a party holding the control over an estate, and a power of selling it to secure the repayment of liabilities he had incurred on account of the owner, received the rents, sold the estates, and then received the purchase money (for which, while he retained it, he was held liable to interest), he was not on account of the acts thus done by him entitled, without any previous stipulation, to claim commission for the trouble he had had in the matter.—*Id.*

7. A sentence of outlawry, upon flight from a charge of felony, does not incapacitate the outlaw from directing, according to the terms of a previously executed trust deed, the trustees as to the mode of carrying the trust into effect.—*Macras v. Hyndman*, 6 Cl. & F. 212.

8. The execution of a trust deed for (among other things) the payment of creditors, does not constitute one of the creditors, who became so after the execution of the deed, and was not a party to it, a *cestui que* trust, entitled to call on the trustee to execute the trusts of the deed.—*Latouche v. Lucan (Earl)*, 7 Cl. & F. 772.

A. executed a trust deed, appointing B. trustee for certain purposes therein stated, one of which was for the payment of creditors, and another was to raise a sum of money by way of mortgage, in order to satisfy a claim for rent due in respect of A.'s lands, then about to be enforced by ejectment. B. obtained from C. an advance of money, with which he satisfied this claim. B. afterwards gave to C. a letter written subsequently to, but dated before, the day of the advance, in which

TRUST AND TRUSTEE—*continued.*

appearing to ask for the advance, he said "I will consider such advance as raised by me under the power given me; and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed." No security was ever executed by *B.*:

Held, that *C.* did not stand in the situation of a *cestui que* trust under the deed, and could not maintain a bill in equity calling on *B.* to execute the trust of the deed. — *La Touche v. Earl of Lucan*, 7 Cl. & F. 772.

See *Symot v. Simpson*, 5 H. L. Cas. 121.

9. A trust disposition and deed of settlement conveyed generally the truster's whole heritage to trustees, containing no precept of sasine, but surrogating the trustees in place of the truster, and binding him and his heirs to complete titles and convey to the trustees; he reserving to himself power to execute entails of parts of his fee simple lands, declaring them to be suspended during the continuance of the trust, except as to rights of patronage; and he executed such entails with precepts of sasine. After his death, the trustees named in the deed having declined to accept the trusts, the first heiress of entail made up titles, and was duly enfeft heiress of entail. Trustees afterwards appointed by the Court, with her consent, and with all the powers given to those who declined to act, raised an action of constitution and declarator against the heiress of line, and called the heiress of entail as defender:

Held, by the Lords (affirming the decree of the Court of Session), that it was not competent for the heiress of entail to oppose the completion of feudal titles, by the trustees to the whole of the lands comprised in the trust disposition; and that they (provided they were duly appointed) were entitled to a conveyance of the whole lands, according to the intent of the trust disposition, but without prejudice to the rights of any party to the lands. — *Preston v. Melville*, 8 Cl. & F. 16.

TRUST AND TRUSTEE—*continued.*

10. Estates in *Scotland* were conveyed by trust disposition to three trustees, to collect and apply the rents as therein mentioned, with 100 *l.* a year for their trouble, besides all the necessary expenses of managing the estates; and with power to appoint and remove factors, pay their salaries, and settle their accounts annually; and within six months after clearance with the factors, to get their own accounts approved by an accountant, whose approbation would be a discharge to them; each being liable only for his own actual intrusions, and no farther liable for the factors than that they should be reputed responsible at the time of their appointment. The trustees appointed one of themselves to be factor, with a salary; and he, though of undoubted responsibility at that time, afterwards fell to owe large balances, at the annual settlements of accounts; whereon one of the trustees, who was cashier, urged him to pay up; but the balances against him increasing, both trustees, after failing in their exertions to obtain payment, revoked his appointment as factor, and he became bankrupt, owing a large debt to the trust estate:

Held, by the Lords (affirming decrees of the Court of Session in *Scotland*, in an action raised by the first heir of entail, to whom the trustees were bound to account for their management),

1st. That the appointment of one of the trustees to be a factor was not of itself such a breach of trust as subjected the other trustees to all the consequences resulting from it.

2nd. That there was not such gross negligence, in the two trustees permitting the factor to retain balances, as to subject them to liability for the ultimate balance due from him to the trust estate. — *Horne v. Pringle*, 8 Cl. & F. 264.

The appointment, by trustees, of one of their number to be factor to the trust estates, would not of itself make them liable for his defaults; but by so making him their agent, they would be liable for his defaults.

TRUST AND TRUSTEE—continued.

as agent, and not as co-trustee, in the same way that they would be liable for the defaults of any other person whom they might appoint to the office. The principle of the rule is the same in *Scotland* as in *England*.—*Home v. Pringle*, 8 Cl. & F. 264.

The mere fact of trustees allowing balances to remain against their factor at the annual settlement of his accounts, where it is impossible to include his whole receipts and payments for the year, is not a breach of trust or such culpable negligence as would make them liable for the ultimate balances due from him to the trust; *secus*, if they assented to his contrivances to retain larger balances than were necessary for the management of the trust.—*Id.*

A trustee does not, by being cashier to the trust estate, incur any additional liability in respect of its management, beyond what he was subject to as trustee.—*Id.*

The rule of the Courts in *England*, preventing trustees from having any office with profit under the trust, or any remuneration for their trouble, beyond what the trust deed allows them, is so beneficial, that a different rule ought not to be sanctioned in *Scotland*. *Quære*, whether the contrary practice there is not assumed, rather than decided to be legal?—*Id.*

11. *N. A.* made a will, with certain trusts relating to his real and personal estate, and appointed trustees to carry them into execution. One of these trusts was for the payment of provisions of 2,500 l. for the younger children, and of 500 l. for the eldest daughter of *R. A. B.*, who was one of the executors and trustees under the will. An Act of Parliament was obtained to carry some of the trusts of this will into execution; and under this Act, lands devised by *N. A.* were sold. The trustee under the Act was *W. L.* On a bill filed against him by the legatee of the 2,500 l., he sought to take advantage of the payment by him of that sum to *R. A. B.*:

Held, that *R. A. B.*'s receipt was no

TRUST AND TRUSTEE—continued.

discharge of *W. L.*'s liability, as by the terms of the Act he was absolutely bound to pay the debts and discharge the children's portions; and it was not set up in the answer, nor proved, that *R. A. B.* had specifically received this money as trustee for his daughter.—*Lawrence v. Blake*, 8 Cl. & F. 504.

12. A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging acquired in violation of this rule.—*Hamilton v. Wright*, 9 Cl. & F. 111.

A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor. It was held that they could not do so, and a decree of the Court of Session, affirming their right, was reversed.—*Id.*

13. By deeds, executed in 1704, Lady *Hewley* conveyed estates to trustees, upon trust, to pay out of the residuary rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of *Christ's* holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of *Christ's* holy Gospel, as the trustees for the time being should think fit; and to dispose of such sums, and in such manner, for promoting the preaching of *Christ's* holy Gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of *Christ's* holy Gospel, as the trustees for the time being should approve and think fit; and to dispose of the re-

TRUST AND TRUSTEE—continued.

mainder of the said rents in relieving such godly persons in distress, being fit objects of her own and the trustee's charity, as the trustees for the time being should think fit. And she directed that when any one of the trustees should die, the survivors should elect in his place such a person as they, in their judgments and consciences, should think fit to be a trustee.

By other deeds executed in 1707, Lady *Hewley* conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; and after directing that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she directed the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704.

By the rules left by Lady *Hewley* to be observed about the qualifications of the old people for the almshouse, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion; and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and Mr. *Edward Bowles's* Catechism.

At the dates of the deeds all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees, of whom the majority were *Unitarians*; one being of the Church of *England*; and they applied the rents for the benefit of *Unitarians*; and that sect became tolerated by law.

Held, affirming judgments of the Court of Chancery, on an information filed in 1830, that neither *Unitarians* nor members of the Church of *England*, but Protestant Dissenters only, were entitled to the benefit of the charities, and that all the trustees were properly removed, as all had concurred in the misapplication of the charity funds. — *Shore v. Wilson*, 9 Cl. & F. 355.

14. *W.* being indebted to *C.*, agreed by deed to convey his estate to *C.*, upon

TRUST AND TRUSTEE—continued.

trust to sell the same, and to pay off certain debts of *W.* due to other persons, and then the debt due from *W.* to *C.*, and to pay over the surplus, if any, to *W.* No conveyance was executed. *C.* being afterwards in possession of the estate under a *fi. fa.*, issued on a judgment upon a warrant of attorney given by *W.*, agreed with *W.*'s agent to purchase the estate. *W.* afterwards ratified the contract, but subsequently impeached it, as one made by a trustee for his own benefit, and against the interest of the *cestui que* trust:

Held, that *C.* was not a trustee for *W.*, but was a creditor, holding a security for his debt; and that the contract of sale was valid.—*Waters v. Groom*, 11 Cl. & F. 684.

15. A testator in *Scotland* gave all his property to trustees: first, to pay his debts; secondly, to pay Mrs. *R.* (a married woman), so much of the annual proceeds as they might deem necessary for the support of her and family during her life, declaring the same to be alimentary and exclusive of her husband, and not to be attachable, nor assignable, nor subject to any debts or debts of her or her husband. The acting trustee, with consent of Mrs. *R.*, assigned to her alimentary creditor the rents of the trust property; first, to pay any debts affecting it; secondly, to pay part of the rents to Mrs. *R.* for aliment; thirdly, to apply the residue in payment of the debts due to the assignee:

Held, that the assignment was void; because, first, it was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment; and secondly, because it violated the express prohibition against alienation. And in this respect the law in *Scotland* is the same as in *England*. — *Rennie v. Ritchie*, 12 Cl. & F. 204.

16. In an agreement between King *James I.* and the City of *London*, in 1609, for a grant by the king of lands in *Ireland*, to be planted and colonised by the city, it was stipulated that 20,000*l.* should be advanced to be expended on the undertaking.

TRUST AND TRUSTEE—*continued.*

The city compulsorily levied that and other sums for the same purpose upon the incorporated companies of *London*. The king afterwards granted a charter, creating a corporation (the *Irish Society*), the members thereof to be from time to time appointed by the city for the management of the plantation, and to whom the lands were thereby granted for ever. The greater part of the lands was afterwards divided in severally between the companies, in the proportion of their contributions to the sums levied on them; but the town lands, ferries, and fisheries, were retained by the *Irish Society*, who, after applying part of the rents and profits towards the building of churches, schools, and other public purposes beneficial to the plantation, divided the surplus among the companies. One of these filed a bill against the Society and other parties, charging the Society, as trustee for the companies, with breaches of trust, in applying among their own members large sums in gifts, and in payments of travelling and other expenses, and calling on them for an account:

Held, that the *Irish Society* was constituted trustee for permanent public purposes, and had a discretion in applying the funds arising from the property retained to these purposes; that though the Society was accountable to the Crown for any neglect of duty in such trust, and also to the City of *London* for misconduct in the management of the property, it was not accountable to the companies. — *Skinner's Company v. The Irish Society*, 12 Cl. & F. 425.

17. The Act 39 *Eliz.* c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them. A municipal corporation is included in "every person and persons," and may exercise the powers given by the Act. — *Newcastle (Mayor) v. The Attorney General*, 12 Cl. & F. 402.

A voluntary conveyance of real estates to a charity is not defeated by a subsequent conveyance for valuable consideration. — *Id.*

Real estates conveyed to, and vested

TRUST AND TRUSTEE—*continued.*

in, a hospital founded under the Act of 39 *Eliz.*, c. 5, cannot be alienated by the hospital, nor can it confirm an alienation of them by the founders. — *Newcastle (Mayor) v. The Attorney General*, 12 Cl. & F. 402.

- A municipal corporation voluntarily founded a hospital under the 39 *Eliz.* c. 5, and purchased real estates, and caused them to be conveyed to the hospital, but which were kept under the control and management of the founders, who afterwards sold and conveyed them for valuable consideration, granting the purchasers covenants for title and indemnity against the claims of the hospital. The founders applied the money produced by the sale, together with other monies of their own, in the purchase of an estate at *W.*, and they paid annually to the hospital more than the rents and profits of the sold estates. The hospital at first concurred in that arrangement, and acquiesced in it for 120 years, after which the Attorney General and the hospital, by information and bill, claimed a portion of the estate at *W.*, bearing the same proportion to the whole estate that the produce of the sale of the hospital's estates bore to the whole purchase money of the estate at *W.*:

Held, 1. That the estates conveyed to the hospital were well vested in it, and could not be sold without an Act of Parliament, and therefore a decree directing the hospital to confirm the sale was in that respect erroneous.

2. That if the hospital's concurrence and long acquiescence in the sale of its estates were held to bar its right to recover them, or a commensurate portion of the estate at *W.*, the Attorney General's right to protect the charity still existed. — *Id.*

See *Magdalen College v. The Attorney General*, 6 H. L. Cas. 189.

18. If charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund. The law is the same in this respect both in *England* and *Scotland*. — *The Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507.

TRUST AND TRUSTEE—continued.

19. In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others; secondly, that forfeiture will be incurred by non-performance of that condition; and thirdly, that the donee may be subjected to loss by the performance of that condition, are sufficient to raise the presumption that in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase. A donor granted to the principal and professors of a college certain lands, "upon the conditions hereinafter specified," to maintain three bursars, "according to the manner, measure, and quality, and as the rest of the bursars of philosophy presently in the said college already founded, are educated and entertained;" and imposed as a condition (the penalty for the breach of which was forfeiture), that the principal and professors should admit to the bursarships the presentees of the donor and his family:

Held (reversing the judgment of the Court of Session), that this was a grant upon condition, and not a mere trust, and that the principal and professors were entitled, after satisfying the conditions of the deed of gift, to appropriate to themselves any surplus arising from the lands thus given.—*Jack v. Burnett*, 12 Cl. & F. 812.

See *Southmolton v. Attorney General*, 5 H. L. Cas. 1; *Beverley v. Attorney General*, 6 H. L. Cas. 314; *Attorney General v. Dean of Windsor*, 8 H. L. Cas. 388.

20. By the Act of 7 & 8 Vict. c. 97, the power of the Commissioners of Charitable Donations and Bequests for Ireland, to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the Commissioners, are to be by themselves applied to charitable uses, according to the donor's intention. And although they obtain the sanction of the Attorney General to

TRUST AND TRUSTEE—continued.

their suit, as required by the said Act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney General. A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the ground of his bankruptcy and residence abroad, but without proof of any improper withholding or concealment, or misapplication of the trust property; and secondly, directing the appointment of another trustee in his place, is wholly wrong.

Semble, that neither bankruptcy nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has unconditionally confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates.—*Archbold v. The Commissioners of Charitable Bequests for Ireland*, 2 H. L. Cas. 440.

See *Curson v. Belworthy*, 3 H. L. Cas. 742; *Harrison v. Guest*, 8 H. L. Cas. 481.

21. In 1825 *Henry Wyatt* and his son *Henry E.*, who had previously carried on business as brewers, admitted another son, *George*, into partnership. By the partnership deed, it was agreed that the plant, &c., which was stated to have been valued at 63,000*l.*, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus monies in the business were stated to amount to 48,915*l.*, on which he was to receive interest. He died in July, 1828, having by his will given his surplus capital to his executors in trust to invest the same in Government or other security, and pay the income to his wife, and after her death to set apart two legacies of 12,000*l.* each for his two daughters and their children. He gave his interest in the business, and the stipulated ordinary capital, to his sons *Henry E.*, *George*, and *William*, the last of whom was a minor, and he directed his executors to carry on the business

TRUST AND TRUSTEE—*continued.*

in conjunction with his two sons until *William* attained 21, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December, 1827, the executors having in the meantime left the surviving partners in the undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827 for administration, which, through the interference of the executors, was abandoned. In 1828 the executors joined in deeds whereby the partnership was dissolved, and *Henry E.* assigned his interest to *George*, in consideration of 20,000*l.*; and the executors released *Henry E.* from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the Court, was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate, and in January, 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital. By several decretal orders made in both causes, accounts were directed to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, and the surplus money due to the testator at his death; and accounts were directed to be taken of the partnership dealings and transactions; and if the Master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstance. The Master having reported that he could not take the accounts through non-production of books, he was, by another order, directed farther to inquire by whom the partnership property was

TRUST AND TRUSTEE—*continued.*

possessed at the death of the testator, and how disposed of, and whether the executors, with due diligence, and without their wilful default, might have possessed themselves out of the partnership property, of sufficient to pay the two legacies of 12,000*l.* The Master again reported that he was unable to take the accounts by reason of the non-production of the books; he found, however, on the evidence before him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might with due diligence, and without their wilful default, have possessed themselves out of the partnership property of a sufficient sum to pay the two legacies. The Court, upon exceptions, negatived the finding of wilful default:

Held, by the House of Lords, that there was no reason for thinking that the surplus capital could, if at all, have been realised, without putting an end to the business, which the executors could not do without breach of their duty; that though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there' ever were partnership assets, out of which the legacies could have been recovered or secured, the executors ought not to be charged with wilful default.—*Rowley v. Adams*, 2 H. L. Cas. 725.

Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties.—*Id.*

22. Although contemporaneous usage and long enjoyment afford grounds for the interpretation of doubtful words in a trust deed, they give no sanction to a breach of trust.—*Drummond v. The Attorney General*, 2 H. L. Cas. 837.

A decree which declares Trinitarian Protestant dissenters alone to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the misapplication of the fund by allowing Unitarian Protestant dissenters to administer it with them.—*Id.*

TRUST AND TRUSTEE—continued.

23. A debtor assigned his house and business, in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting:

Held, that a sale afterwards made by the trustees, without farther notice, was unauthorized and unlawful.—*Tomney v. White*, 3 H. L. Cas. 49.

24. Where trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust-funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a court of equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding.—*Prendergast v. Prendergast*, 3 H. L. Cas. 195.

The costs of the appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed.—*Id.*

25. If a trustee has a power or a trust to sell property, he must *bonâ fide* have some one to deal with in the sale of it.—*Lewis v. Hillman*, 3 H. L. Cas. 607.

If an attorney or agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet, if instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void.—*Id.*

Under the Act 10 & 11 Vict. c. 96, it is entirely a matter for the discretion of the Court to direct a bill to be filed for the purpose of more solemnly considering a question

TRUST AND TRUSTEE—continued.

raised on a proceeding by petition taken under that Act.—*Lewis v. Hillman*, 3 H. L. Cas. 607.

On a petition presented under that Act, praying for the payment out of Court of money then in Court, and on cross-petition in opposition thereto, the Court has full power to declare the validity or invalidity of any deed on which the claim to that money is vested.—*Id.*

Quære, whether this may not properly be done upon petition alone, without any necessity for filing a cross-petition? such necessity, if it exists, may be dispensed with by consent.—*Id.*

A. was entitled to a reversionary interest in one-fifth share of certain real and personal estate then held by a devisee for life. A. granted to B. an annuity upon it: the annuity deed, which was registered, contained a power of sale; the annuity fell into arrear, and B. determined to exercise the power of sale. The sale was effected for a sum of 900 l.; but the purchaser discovered an objection in the memorial registered, which rendered the annuity deed invalid, and he refused to complete the purchase, and obtained a return of his deposit-money. The solicitors of B. (acting at the time, as they stated, from motives of kindness to A.) obtained from A., who had not the benefit of any solicitor's advice, an assignment of the reversionary interest to L. for the sum of 900 l., and after the reversion fell in by the death of the tenant for life, claimed the property as the purchasers, alleging that the purchase had been made by L. as their agent and on their behalf. The executors declined to pay them the value of the property, which it was then found amounted to 1770 l., but paid it into Court under the 10 & 11 Vict. c. 96 (the Trustee Act). The solicitors presented a petition to have the money paid out to them as purchasers of the reversionary interest under the deed of assignment to L. A. opposed the payment on affidavits which set up a case of deception and fraud practised on him. The parties on both sides

TRUST AND TRUSTEE—*continued.*

agreed that the case should be heard on petition and affidavits as if a petition and cross-petition had been filed. The Vice-Chancellor ordered the money to be paid out of Court to the solicitors as purchasers. The Lord Chancellor, on appeal, reversed this order, declared the assignment to be invalid, and ordered the money to be paid back into Court; reserved the costs, and gave either of the parties liberty to make any farther application to the Court:

Held, that the Lord Chancellor's order was correct; that the purchase by the solicitors, who were at the time the solicitors of the vendor, was contrary to the rules of equity, and void; that it was in the discretion of the Court to order a bill to be filed; that without any consent the Court had jurisdiction, on petition and cross-petition, under the statute, to declare the deed of assignment invalid, as well as to order repayment of the money; that the consent here given waived any possible necessity for a cross-petition; and that the order was not bad for not directing a return to the solicitors of the money they had paid as purchase-money, for that the leave reserved to either party to make any farther application to the Court enabled them to obtain a return of this money.—*Lewis v. Hillman*, 3 H. L. Cas. 607.

26. An Act of Parliament incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; it authorized persons to "contract for, sell, and convey their lands," gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying, and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid, to all intents, &c. *S.* was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of *S.* the lord made a proclamation for the heir of

TRUST AND TRUSTEE—*continued.*

S. to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of *S.*, or such other person as the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and farther praying for a perpetual injunction and general relief. The Vice-Chancellor made a decree directing that the customary heir of *S.* (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed:

Held, that the decree of the Vice-Chancellor was right.—*Dimes v. The Grand Junction Canal Company*, 3 H. L. Cas. 794.

27. *A.* and *B.*, father and son, executed in 1818 an indenture of settlement on occasion of the son's intended marriage. The father and son, the lady and her father, and other persons, trustees, were parties to the indenture. Certain freehold estates were conveyed to the trustees for *A.* for life, remainder to *B.*, and these estates were exonerated from debts due by *A.*, which debts were made charges on certain leasehold premises expressly named. These premises were vested in trustees, on trust (among other things) to keep down the interest of *A.*'s debts affecting any of the estates comprised in the deed, and they were empowered "with the desire and consent" of *A.* and *B.*, and notwithstanding any of the trusts therein contained, to sell the leasehold premises so put in settlement

TRUST AND TRUSTEE—continued.

for the payment of the debts and incumbrances. Another deed was executed by *A.* and *B.* in 1824, which recited the former, appointed new trustees, added new debts, and made provision for the payment of all. The trustees never acted in discharge of the trust, and the deeds were not communicated to the creditors, but *B.*, who, by an arrangement with his father had possession and management of the estates, paid the interest on the debts. After the deaths of both *A.* and *B.*, the son of the latter entered into possession of the estates. *C.*, a bond creditor, whose name and claim were set forth in the schedule to the deed of 1818, filed a bill to have the trusts of that deed carried into execution.

The Court of Chancery in *Ireland* held, that this debt "was within the trust contained in the indenture for the payment of the scheduled debts."

On appeal, this decision was affirmed, Lord *St. Leonards diss.*—*Synnot v. Simpson*, 5 H. L. Cas. 121.

29. Where one person entrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due, equity will compel their transfer.—*Stanton v. Percival*, 5 H. L. Cas. 257.
30. *R. P.* being seised in tail of the estate *R.*, executed in 1826 a settlement, by which, on the marriage of his eldest son *D.*, it was settled (subject to an annuity to himself) on *D.* for life, then to the first son of *D.* by that marriage, "and of the heirs male of such son lawfully issuing," and for want of such issue to the second, third, and fourth, &c., sons, in the same manner, and for want of such issue to the right heirs of *D.* In 1827, *R. P.* entered into an agreement with *D.* by which, for valuable considerations therein mentioned, he covenanted to convey to *D.* (subject to a life estate in himself), to the same uses as those of the *R.* estate, another estate called *C.*, if (as he expected) he should become possessed of it through the

TRUST AND TRUSTEE—continued.

death, without issue and intestate, of a lunatic brother. A commission was taken out against this brother, who was found to have been lunatic from 1823. In 1829, the lunatic died, and *R. P.* took possession of the estate *C.* In 1830, *R. P.* executed a deed, by which (subject to an annuity to himself) he conveyed the estate *C.* to *H.* his second son. *D.*'s wife died in 1829, and in 1833 *D.* married again, and covenanted to settle on this marriage the estate *C.* to the same uses as those declared of the estate *R.* in the first settlement. *D.*, his second wife, and the children of both marriages, filed a bill against *R. P.* and *H.*, to set aside the deed of 1830 as fraudulent, and to have a conveyance of the estate *C.* executed according to the deed of 1827; and in 1840, this House on appeal made an order to that effect. In the meantime *G.*, a natural son of the lunatic, had raised a claim, as devisee of the estate *C.*, under a will alleged to have been made by the lunatic before 1823. *R. P.* died, and *G.* and *H.* entered into an arrangement by which, in consideration of *G.* releasing his claims under the alleged will, *H.* agreed to convey to *G.* part of the estate *C.*, of a certain value, and to assure to him the other part to supply any possible deficiency in that supposed value. *D.*, his wife, and all his children, filed a supplemental bill against *H.* and *G.*, to have a conveyance of the estate *C.* executed in conformity with the order of the House:

Held, affirming a decree of the Court of Chancery in *Ireland*, that *H.* was in the situation of a trustee for *D.* of the estate *C.*, and must execute a conveyance of it, and that he was not relieved from that liability by any purchase of the alleged rights of *G.* If any such rights existed, he might set them up afterwards and by a distinct process, but he could not by the use of them embarrass the trust which he had accepted on taking the conveyance from *R. P.*—*Persse v. Persse*, 5 H. L. Cas. 682.

31. Charities are trusts, and are, as such, within the operation of the 3 & 4

TRUST AND TRUSTEE—*continued.*

Will. 4, c. 27.—St. Mary Magdalen v. The Attorney General, 6 H. L. Cas. 189.

Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and churchwardens, who, with the consent of the vestries, might lease them. The rectors, &c., executed a lease of them for ever to the president and scholars of a college subject to a fixed rent-charge. Above 60 years after the execution of this lease (the fairness of which at the time of its execution was not impeached), the Attorney General filed an information against the lessees, praying that it might be cancelled:

Held, that the real plaintiffs in this suit were the poor of the two parishes; that they were in the situation of a *cestui que trust*, that the suit by information of the Attorney General (who had no independent rights), was a suit by them; that they could not maintain such suit (unless against their trustees), except within 20 years; that this was not such a suit, but was a suit against purchasers for value, and therefore that it was barred.—*Id.*

32. An express trust of a charge upon land is, by the true construction of the Statute of Limitations, 3 & 4 *Will. 4, c. 27*, as much saved from its operation as an express trust of the land itself.—*Burrowes v. Gore*, 6 H. L. Cas. 907.

33. A testator gave to trustees funds to be applied by them "according to their discretion for the advancement and propagation of education and learning all over the world:"

Held, that this was a valid charitable bequest, and was not void for uncertainty.—*Whicker v. Hume*, 7 H. L. Cas. 124.

34. A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Certain estates were conveyed to trustees, with a power to sell, on the consent in writing of A. and B., or the survivor, and to apply the produce of

TRUST AND TRUSTEE—*continued.*

the sale in payment of debts therein specified. A. was indebted to D., as trustee for an infirmity, and A. and B., had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up, against A. and against B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves. He was a party to the deed and executed it:

Held, that this deed created a trust in favour of the infirmity of which he was a trustee.—*Montefiore v. Browne*, 7 H. L. Cas. 241.

35. S. and S., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part; certain of the creditors, as trustees of the second part; and the general scheduled creditors (among whom the trustees were named) of the third part. The deed empowered the trustees to carry on the business under the name of the "*Stanton Iron Company*," to execute all contracts and instruments necessary to carry it on; to divide the net income to be taken among the creditors in rateable proportions (such income to be deemed the property of S. and S.), with power to the majority of the creditors assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to S. and S. Two of the creditors, C. and W., were named among the trustees. C. never acted. W. acted for six weeks and then resigned. Some time afterwards, the other trustees, who continued to carry on the business, became indebted to H., and gave him bills of exchange accepted by themselves, "*Per proc. the Stanton Iron Company*":

Held, that there was no partnership created by the deed, and that consequently C. and W. could not be sued on the bills as partners in the company.—*Cox v. Hickman*, 8 H. L. Cas. 268.

Held also, that they could not be sued for goods sold and delivered, there

TRUST AND TRUSTEE—*continued*.

being no distinction upon the question of liability between the bills and the consideration for which they were given.—*Cox v. Hickman*, 8 H. L. Cas. 268.

36. A small piece of land was granted by deed (duly executed under the statute of mortmain), to trustees for a charitable purpose, which could only be carried into effect by funds being provided for that purpose. The deed remained in the possession of the grantor, who received, during life, the benefit of the produce of the land. The funds necessary for carrying into effect the purpose of the deed, were provided by the will of the grantor. There was no provision in the deed for appropriating in any way the produce of the land, or the rent received between the date of the deed and the time when its provisions might be carried into effect :

Held, that there was no resulting trust so as to avoid the deed. — *Fisher v. Brierley*, 10 H. L. Cas. 159.

See 24 & 25 Vict. c. 9.

37. *Quere*, whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate. — *Watkins v. Frederick*, 11 H. L. Cas. 358.
38. Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged. — *Macdonnell v. White*, 11 H. L. Cas. 570.
- In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognisant of all the matters connected with it.—*Id.*
- A., being greatly in debt, executed a deed of trust for the benefit of creditors, and among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really

TRUST AND TRUSTEE—*continued*.

a high rack-rent; the tenant complained, and the trustee, with the knowledge of A., though without his consent, but with the full assent of A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent; A. complained of the abatement, but he took no steps to put an end to it :

Held, that the estate of the trustee could not, after the expiration of the trust, be called on to make up the deficiency.—*Macdonnell v. White*, 11 H. L. Cas. 570.

While the trust was in existence, A., who had been absent from the country, returned, was informed of all that had occurred, and made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust :

Held, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate, as to those which would afterwards become due, consequently, no steps having been taken to enforce payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, be made liable for those arrears.—*Id.*

TUTOR. See CHANCERY. JURISDICTION.

A Scotchman, by deed, duly made in the Scotch form, appointed his wife and eight other persons, all domiciled and resident in Scotland, to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight, accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to England, and after residing for three years in various places there for the health of both, the widow died, recommending the infant to the care of her grandfather, who was then residing in England. The grandfather filed a

TUTOR—continued.

bill in Chancery in the infant's name, for the sole purpose of making her a ward of Court, and preventing her removal to *Scotland*; and upon a contest arising between him and the *Scotch* tutors for the guardianship of the infant, the Lord Chancellor made an order in the usual form, referring it to the Master to approve of proper persons to be guardians:

Held, by the Lords (affirming that order);

1st. That the *Scotch* testamentary tutors were not testamentary guardians in *England*, according to the Act 12 Car. 2, c. 27.

2nd. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in *Scotland*.

3rd. That the Court was bound to appoint guardians to the infant, she being made a ward by the mere filing of the bill; and although the *Scotch* testamentary tutors had the exclusive control of all her property, and were answerable to the *Scotch* Courts only, they had no authority over the infant in *England*, nor power to protect her; nor were entitled, by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in *England*. *Dissentientibus*, Lord Brougham and Lord Campbell.

4th. That persons residing out of the jurisdiction may, if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction.—*Johnstone v. Beattie*, 10 Cl. & F. 42.

See *Stuart v. Bute (Marquis)*, 9 H. L. Cas. 440; *Moorhouse v. Lord*, 10 H. L. Cas. 285.

UNSOUNDNESS OF MIND. See INSANITY.

On a question whether a deed was void in law on the ground of unsoundness of mind by the person by whom it was executed, the judge directed the jurors that the question

UNSOUNDNESS OF MIND—continued.

for them to try was, whether *J. S. B* was a person of unsound mind or not, and that to constitute such unsoundness of mind as to avoid a deed at law, the person executing it must be incapable of understanding and acting in the ordinary affairs of life. Exception to this, for that the judge ought to have directed the jury that the unsoundness must amount to idiocy, in the strict definition of the term. Direction held to be good, and this decision of the Court below affirmed in this House.—*Ball v. Mammie*, 1 Dow & C. 380.

USER. See FISHERY.

The appellant claiming under a grant by Char. I. of the soil between high and low-water marks along the coast of the county of *Southampton*, erected a wharf, dock, &c. between high and low-water marks in *Portsmouth* harbour. The Attorney General filed an information to abate these erections, as a nuisance. The grant was in general terms, but there did not appear to have been possession taken of this particular spot till 1774. The Court granted a decree, as prayed, for the removal of the nuisance. This decree was affirmed solely on the ground of non-user as to this particular piece of land, without reference to any question as to the general validity of the grant.—*Parmeter v. The Attorney General*, 1 Dow, 316.

USURY. See now 17 & 18 VICT. c. 90.

The limitations in the 31 *Eliz.* c. 5, must be understood as incorporated into the provisions of the *British* statute 12 *Anne*, Sess. 2, c. 16, and were therefore held to be applicable to an action brought in the Court of Session in respect of usurious transactions against the latter statute.—*Surtees v. Allan*, 2 Dow, 254.

2. Where money is advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance is protected, and the bills themselves are valid under the 3 & 4 *Will.* 4, c. 98, s. 7, and though a warrant of attorney to confess judgment may be taken at the same moment on which judg-

USURY—*continued.*

ment is the next day entered up and registered under 1 & 2 *Vict.* c. 110, so as to become a charge on the lands of the debtor, the transaction is not thereby rendered invalid under the proviso of the 1st section of the 2 & 3 *Vict.* c. 37.—*Eane v. Horlock*, 5 H. L. Cas. 580.

The 2 & 3 *Vict.* c. 37, does not repeal the 3 & 4 *Will.* 4, c. 98.—*Id.*

Seem, that a warrant of attorney to confess judgment, though by such judgment the lands of the debtor may be charged, is not a charge upon land.—*Id.*

H. had received from *L.* money advanced on the security of bills of exchange. In October, 1843, he wanted a farther advance, which *L.*, after inquiring into the value of his real estate, consented to make, on condition that *three months' bills* should be given for the amount (usurious interest included), and that a warrant of attorney to confess judgment, which *L.* should be at liberty to enter up immediately, should also be executed. All this was done, and judgment was entered up on the following day, and the judgment registered. The bills given in October, 1843, were not paid when they became due in January, 1844, and others were then substituted for them. These last were also dishonoured. A sale of *H.*'s estate took place, under a mortgage executed to a prior creditor, who received more than would satisfy his claim:

Held, that *L.* was entitled to maintain a bill against him to pay over so much of the surplus in his hands as would satisfy *L.*'s judgment.—*Id.*

VENDOR AND PURCHASER. *See* LIEN. SALE.

1. *A.*, in December, 1812, agreed to become the purchaser of a reversionary estate; *B.*, the vendor, agreed, on or before the 1st of May then next, to make out a good title. *A.* was to be entitled to the rents and profits of all and singular the messuages, &c., from the 1st of May then next, or from such time as the said purchase should be completed. *A.* had at the

VENDOR AND PURCHASER—*continued.*

time of making the agreement, paid part of the purchase money, and he promised, for the considerations aforesaid, that he would, on the said 1st of May, pay the remainder, as and for the absolute purchase, &c. *A.* farther agreed to pay all and every such sum and sums of money for the increased value of the said messuages, &c., by or in consequence of the deaths of any persons for whose life or lives any of the messuages were theretofore granted. The purchase was not completed for a very considerable period. The vendor filed his bill for a specific performance. The Court made a decree, referring it to the Master to inquire when the vendor could make a good title, and how much the value of the estate had been increased by the deaths of the persons on whose lives any portions of it were holden:

Held, that this decree was correct, and that the contract did not give the vendor a right to demand payment for the increased value of the estate from the wearing as well as the dropping of lives.—*Brooks v. Champnoime*, 4 Cl. & F. 589.

2. *A.* contracted with *S. S.* and *T.*, for the sale to them, in their own names, of freehold and leasehold property, including mines and works for making iron; the purchase being made, in fact, for a numerous company, of which *S. S.* and *T.* were managing directors. Some difficulty occurring as to *A.*'s title, the time for completing the contract elapsed, but upon treaty, *S. S.* and *T.* agreed to complete it, if *A.* would verify his statements of the capabilities of the property; and on his consenting, they deputed some of their co-directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works, and the accounts kept by *A.*, receiving from him and his agents all facility and aid for the purpose; and they reported to their constituents that *A.*'s statements were correct, and *P. T.*, their partner and agent, remaining on the property, with particular instructions to make farther examination, made

VENDOR AND PURCHASER—*continued.*

a similar report; whereupon a supplemental contract was completed, varied from the first, by reducing the purchase money and releasing *S. S.* and *T.* from personal liability for the unpaid instalments. After six months' possession by the agents of *S. S.* and *T.*, and the company working the mines, and exercising other acts of ownership, in deterioration of the property, all the directors, and *P. T.*, filed a bill in the Exchequer on behalf of themselves and all their partners, against *A.* and his agents, to rescind the contract for fraud. After replication to the answers, the plaintiffs, except *T.* and *P. T.*, obtained an order of Court, though opposed by *A.*, to amend the bill, by striking out the names of *T.* and *P. T.*, as plaintiffs, and making them defendants; and they amended the bill accordingly, and charged *P. T.* with collusion in the alleged fraud of *A.* :

Held, by the House of Lords (reversing the decree of the Court of Exchequer, except so far as it acquitted *P. T.* of the charge of collusion, and dismissed the bill as against him), that the contract could not be rescinded; first, because there was no proof of fraud (*Lords Lyndhurst and Wynford dissensientibus*); secondly, because the purchasers did not rely on *A.*'s statements, but tested their accuracy, and after having knowledge, or the means of knowledge, declared that they were satisfied of their correctness.—*Atwood v. Small*, 6 Cl. & F. 232.

If on the treaty for the sale of property, the vendor makes representations which he knows to be false, the falsehood of which the purchaser had no means of knowing, but he relies on them, a Court of Equity will rescind a contract so entered into, although it may not contain the misrepresentations; but will not rescind it without the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them.—*Id.*

See *Venezuela Company v. Kisch*, L. R., 2 H. L., 99.

If a purchaser, choosing to judge for

VENDOR AND PURCHASER—*continued.*

himself, does not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representation; the rule being *caveat emptor*, and the knowledge of his agents being binding on him as his own knowledge.—*Atwood v. Small*, 6 Cl. & F. 232.

3. Trustees for sale of a manor, described it in advertisements, and particulars and conditions of sale, as a manor in which the fines were arbitrary; adding that the clear profits, on an average of the last eight years, had been 150 *l.* a year; and it was one of the conditions of sale that if there should be any error or mis-statement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way. After the sale, it was found that by the custom of the manor arbitrary fines were payable only on alienation, and that on the death of the tenant, his customary heir paid upon admittance a small fixed sum, and the widow was admitted to her free bench without any payment. It was also found that the clear profits exceeded 200 *l.* a year :

Held (reversing a decree made on a bill which was filed by the purchaser for specific performance, with compensation in respect of the mis-statement as to the fines), that there was no such misdescription of the property as would entitle the purchaser to compensation, inasmuch as the annual profits, which constituted the substantial value, far exceeded the amount stated.—*White v. Cuddon*, 8 Cl. & F. 766.

Semble, that if there was a substantial misdescription, a Court of Equity would not enforce against trustees specific performance with compensation, as being prejudicial to the *cestui que trust*, and incapable of being ascertained.—*Id.*

The vendor and purchaser consenting to a specific performance, without compensation, the decree was accord-

VENDOR AND PURCHASER—continued.

ingly so varied, the purchaser paying the costs of the suit.—*White v. Cuddon*, 8 Cl. & F. 766.

4. *Undue Influence*.—A bill by A. F. as heiress-at-law of J. J. and E. J., to set aside conveyances made by them to W. F., of real and personal estates, on the ground of fraud, undue influence, and want of consideration, alleged that J. J., who was deaf and dumb all his life, was incapable of executing or understanding any deed, and that E. J. was seduced by W. F., and being subject to his authority, executed the deeds without professional advice, and for insufficient consideration, consisting only of a bond of W. F. for securing the price. There was not sufficient evidence of J. J.'s incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of E. J., and of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connexion between her and W. F.; it appeared also that A. F. had the benefit of the bond given to E. J., and had long acquiesced in, and admitted the validity of, the transactions:

Held, that the bill was properly dismissed for want of sufficient proof of the charges as alleged, such as would justify the Court in setting aside concluded transactions. — *Farmer v. Farmer*, 1 H. L. Cas. 724.

5. A bill filed by a purchaser to set aside a purchase and conveyance of an estate on the ground of fraudulent concealment of a right of way, dismissed with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way.—*Wilde v. Gibson*, 1 H. L. Cas. 605.

To set aside a purchase, perfected by conveyance and payment of the purchase money, for fraudulent concealment of a defect in the title to the estate, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient; there must be proof of direct personal knowledge and concealment by the principal.—*Id.*

VENDOR AND PURCHASER—continued.

A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for any act of non-communication by him.—*Wilde v. Gibson*, 1 H. L. Cas. 605.

Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.—*Id.*

Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud. Where a purchaser of an estate seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other ground.—*Id.*

See *Archbold v. Commissioners for Charitable Bequests in Ireland*, 2 H. L. Cas. 440; *Smith v. Kay*, 7 H. L. Cas. 755; *Harrison v. Guest*, 8 H. L. Cas. 481.

6. A bill was filed by a remainderman to set aside a sale of lands made nearly 50 years before, under a decree in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate; it charged irregularity and error in the proceedings, and fraud in the sale:

Held, affirming a decree of the Court below, that in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under its value by reason of any corrupt bargain, the sale was not impeachable.—*Bowen v. Evans*, 2 H. L. Cas. 257.

After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it is clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity; and in that case, it is immaterial by what machinery or con-

VENDOR AND PURCHASER—*continued*.

trivance the fraudulent transaction may have been effected, whether by a decree in equity, or judgment at law, or otherwise. But in proportion as such jurisdiction is powerful, so ought the caution of the Court to be anxiously exercised, lest in its zeal to do equity the reverse may be effected.—*Bowen v. Evans*, 2 H. L. Cas. 257.

7. Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a Court of Equity will not, simply on that account, refuse its interference to compel specific performance.—*Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 331.
8. A Court of Equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate.—*Colyer v. Finch*, 5 H. L. Cas. 905.

Semble, that where a devise of a real estate charged with payment of debts sells the real estate, the purchaser is not bound to inquire (unless special circumstances call for such an inquiry) whether the money is applied in the payment of debts, or whether the sale was intended for that purpose.—*Id.*

9. *T.* was the owner of certain machinery in a mill; it was purchased by *H.*, but not removed, and *T.* continued in possession. *T.* executed a deed (which was duly registered), by which it was declared that the machinery was the property of *H.*; that *T.* desired to repurchase it for 5000 *l.*, but had not the money to pay for it, wherefore it was conveyed to *B.* in trust, when *T.* should pay the money, to transfer it to him, and if he did not pay the money to hold it absolutely for *H.* The deed contained a covenant by *T.* to insure the machinery, and another covenant that all the machinery which, during the continuance of the deed should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. *T.* sold some of the

VENDOR AND PURCHASER—*continued*.

original machinery, purchased new machinery, and sent to *H.* accounts of these sales and purchases, but nothing was done by or on behalf of *H.* to take possession of the newly purchased machinery. On the 2nd April, 1860, *H.* served *T.* with notice of a demand for payment of the 5000 *l.* An execution against *T.* was afterwards put in by a creditor:

Held, that though there had been no *novus actus interveniens*, the title of *H.* was preferable to that of the execution creditor, as to the new as well as the old machinery.—*Holtroyd v. Marshall*, 10 H. L. Cas. 191.

(*Mogg v. Baker*, 3 Mee. & Wels. 195, commented on.)—*Id.*

VICARAGE. *See* ADVOWSON. QUARE IMPEDIT.

1. In *quare impedit* to determine the right of presentation to the vicarage of *K.*, in the diocese of *E.*, plaintiff to prove the presentation of a clerk by the person under whom he claimed, and the clerk's admission and institution, gave in evidence a visitation book of the diocese of *E.*, which contained the following entry: "*Henricus Compton, in jure civili Baculaeus ac verbi Dei predicator, admissus fuit ad inserviendum cura animarum, in ecclesia parochiali de Kilglasse per Edwardum, Elphin: Episcopum, sexto Octobris, 1622.*" Throughout a long list of entries in the same book, when the duty was *ad inserviendum cura animarum*, or *ad peragendum officium curati*, the word *admissus* was used as in the above entry; when the admission was *in vicariam* the words used were *admissus et institutus*. The judges of the Irish Court of Common Pleas, before whom the action was tried at bar, directed the jury, that the above entry as to the admission of *Compton* "was, in legal construction, to be taken to mean that *Compton* had been admitted and instituted to the vicarage of *K.* on a presentation by some other person" to the Bishop, who claimed the advowson in right of his see, "and that the only question for the jury was, by whom the presentation was made." Exception, that the entry ought not in legal

VICARAGE—*continued.*

construction to be taken to mean that *Compton* was admitted and instituted to the vicarage; but exception overruled, and judgment for plaintiff. The judgment reversed by the Exchequer Chamber, and the judgment of reversal affirmed by the Lords, for that the judges ought not to have taken the question as to the import and effect of the entry out of the hands of the jury, and that having so taken it upon themselves, they put a wrong construction on the entry. — *Cooke v. Elphin (Bishop)*, 2 Dow & C. 247.

WAIVER. See DELAY. LIMITATIONS (STATUTE OF). PRACTICE.

1. *W.* was authorised by a private Act of Parliament to receive tonnage dues on goods conveyed by a railway, and also a tonnage duty on carriages conveying passengers, goods, or parcels. He had for some years received money in respect of the tonnage levied on goods and parcels alone:

Held, that this did not prevent him from afterwards claiming payment on the tonnage duty on passengers. — *Edinburgh Railway Company v. Wauchope*, 8 Cl. & F. 710.

WARRANTY OF A HORSE.

- A. sold to B. a horse, and gave the following receipt: Received, &c., the price of my dark bay horse sold to you. I warrant this horse sound, free from vice, and every blemish; he is quiet, in harness and sure footed, and a thorough broke horse for either gig or saddle." There was at the time of the purchase a verbal representation that the horse had been sent by a gentleman in *England* to A. for the purpose of sale. This representation was untrue; it had been sent for sale by a gentleman of *Leith*, expressly on the ground that, while going down a hill, it had, without any apparent cause, kicked out, run away, and upset the gig, and so was considered by its then master as unfit for use in a gig. The evidence in the cause showed that it had, after going quietly and well for two months,

WARRANTY OF A HORSE—*continued.*

misbehaved itself in a similar manner with B., but there was much evidence to impeach B.'s fitness for driving. On this point, the jury found for A. The Court of Session confirmed the finding, which was also upheld by this House. — *Geddes v. Pennington*, 5 Dow, 159.

But as there had been a misrepresentation as to the occasion of the sale of the horse, the object of which misrepresentation must have been to prevent inquiries, the judgment was affirmed without costs.—*Id.*

See *Budd v. Fairmann*, 5 Car. & P. 85; *Canham v. Barry*, 15 Com. B. 609; *Cornfoot v. Fowke*, 6 Mee. & Wels. 367; *Kendall v. Webster*, 1 Hurl. & C. 450.

WATER.

1. A canal, formed under a private Act of Parliament, had three levels, of which A was the highest, B the middle, and C the lowest level. The canal proprietors (though without authority under their Act to do so) erected engines between the C level and the plaintiff's mill-Forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new Act, repealing former Acts, and re-enacting their provisions, with certain alterations and additions, was passed. The 15th section gave the canal proprietors authority to maintain engines, &c., for supplying the canal with water, and for that purpose to have reservoirs and feeders supplied from all brooks, streams, &c., from which they were lawfully supplied before the passing of the Act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs; and for any of the purposes aforesaid to use such engines as they shall judge proper, making full satisfaction for all damages to be sustained by the owners of any mills, forges, brooks, streams, &c., taken, used, removed, diverted or injured" in execution of the powers of the Act. By the 80th section, the canal proprietors were forbidden to take for the use of the canal any water

WATER—*continued.*

out of the river above the plaintiff's forge, and they were directed to maintain flood weirs, so that all waste water running into level C, not required for the purposes of the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up, as before, the water out of level C back into the level A, in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river :

Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation under the Act. — *Elwell v. The Birmingham Canal Company*, 3 H. L. Cas. 812.

See *Delamere v. The Queen*, L. R., 2 H. L., 419.

- 2 The principles which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.

Where, therefore, a landowner and millowner who had for above 60 years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining landowner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title, as landowners, to the use of the water :

Held, that A. had no right of action.
— *Chasemore v. Richards*, 7 H. L. Cas. 349.

WEIGHMASTER IN A MARKET. *See* OATH.

1. The office of weighmaster in a market town in *Ireland* is a freehold office. The appointment to it ought to be for life.—*M' Mahon v. Lennard*, 6 H. L. Cas. 970.
2. It is not necessary, in an action by the weighmaster for disturbance in his office, to show a formal appoint-

WEIGHMASTER, &c.—*continued.*

ment to it by deed. His having acted in the office for several years is sufficient.—*M' Mahon v. Lennard*, 6 H. L. Cas. 970.

3. The office of weighmaster, mentioned in the Act 4 *Ann.* c. 14, is not the same as that of weigher, mentioned in the Acts of 1 *Hen.* 4, c. 13, and 4 *Hen.* 4, c. 20 (introduced into *Ireland* by the 10 *Hen.* 7, c. 22). The statute of *Ann.* refers only to a weighmaster appointed to regulate the dealings between individuals in an open market; the statutes of *Hen.* 4 apply to weighers of goods appointed to take customs thereon for the Crown, and therefore the provisions of the statutes of *Hen.* 4, that such office should not be for life, but only for pleasure, did not apply to the weighmaster under the statute of *Ann.*—*Id.*

WILL. *See* ENTAIL. HEIR-AT-LAW. INFLUENCE (UNDUE). SETTLEMENT.

1. *Things.*—A testator devised his freehold lands, collieries, &c., to trustees, for the benefit of his wife for life, and gave and bequeathed "all and every the waggon ways, rails, shafts, and all implements, utensils, and things which at the time of my death shall or may be used, &c. for the working of the collieries, or shares of collieries, and which shall be deemed or considered to be as or of the nature of personal estate, to my executors, &c., on trust to permit and suffer the same to be from time to time held, used or enjoyed by the persons respectively entitled by my will to the use and enjoyment of my freeholds, collieries, &c., so far as the nature of the said property and the rules of law and equity will admit :

Held, that under the words "and things," coals remaining at the pits, and staiths and money due, did not pass, but formed part of the residue.—*Stuart v. Marquis of Bute*, 1 Dow, 73.

See *Casher v. Holmes*, 2 B. & Ad. 592; *Brooke v. Turner*, 7 Sim. 677.

2. *Trustees' Interest.*—Gifts of annuities and sums of money which the personal estate was insufficient to satisfy ;

WILL—continued.

"and I do appoint *J. H., W. H., and C. P.* as trustees of inheritance for the execution hereof." The testator made a codicil, in which he said that it was his wish that if either of his estates must be sold, that the *D.* estate should be first sold :

Held, that to effectuate the intention of the testator, the trustees took an interest in the real estate for the purposes of this will.—*Trent v. Trent*, 1 Dow, 102.

See *Re Turner*, 2 De G. F., & J. 529 ; *Lewis v. Matthews*, L. R., 2 Eq. 178.

3. *Heir—Election.*—Testator left certain legacies to his heir-at-law. He gave specific direction as to the disposition of his estates, which were to go to trustees, in order to carry into effect these directions. He entered into contracts to purchase other estates, which contracts were completed by his executors after his death, and his will contained directions that any of these contracts not completed by him during his life, should be completed by his executors, and that these newly purchased estates should go to his executors, subject to the same trusts as those directed with regard to the estates already in his possession :

Held, that the heir was bound to elect between these newly purchased estates, to which he was legally entitled as heir-at-law, and the benefits given him by the specific legacy in the will.—*Rendlesham v. Woodford*, 1 Dow, 249.

See now, 1 Vict. c. 26.

4. *Nature of Property Devised.*—A testator devised and bequeathed real estates, and sums of money charged on real estates, to trustees, on trust to lay out the residue of the personal property either on the purchase of lands of inheritance, or at interest, as his trustees should think most fit and proper, and then upon trust to pay the rents, profits, and interest to different persons in succession for estates for life and their children in tail, first in tail male, but on failure of males, then in tail

WILL—continued.

general. The trustees did not act in the matter. Some of the tenants for life died without issue, but at length one of the tenants in tail became entitled. In a suit between his widow and the next in remainder :

Held, that the property was to be considered as land according to what appeared to be the intention of the testator to be collected from the whole will.—*Cowley v. Hartstonge*, 1 Dow, 361.

See *Ackers v. Phipps*, 3 Cl. & F. 665 ; 9 Cl. & F. 583 ; *Prendergast v. Prendergast*, 3 H. L. Cas. 216 ; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

5. *Cross-Remainders.*—Testator devised "all my lands at *U.*" to his niece for life, same to trustees to preserve contingent remainders ; remainder to her first and other sons successively in tail male ; remainder to her daughters as tenants in common ; and for default of such issue, to the issue of his four sisters "in tail, in such manner as I have limited the same to my said niece's issue," and for default, to his own right heirs :

Held, that cross-remainders were raised as between the issue of the four sisters.—*Clayton v. Roe*, 1 Dow, 384.

See *Sugd. Law of Property*, 283 ; *Taafe v. Conmee*, 10 H. L. Cas. 69 ; *Atkinson v. Holby*, Id. 323.

6. *Life Estate.*—Lands in *Scotland* were conveyed to *A.* "in life rent for his life rent use allennarly, and to his heirs whomsoever" :

Held, that *A.* took only a life estate, and could not sell the estate nor burden it beyond the period of his own life. — *Thomson v. Thomson*, 1 Dow, 417.

7. *Instructions for Will.*—*A.*, a testator in *Scotland*, made a will in the *Scotch* form, and then one with similar provisions in the *English* form, the object of the second will being to affect property out of *Scotland* with the same trusts as the *Scotch* property. Some few years afterwards he wrote to his agent, "I wish a codicil to be made to my last will

WILL—continued.

and testament in the following manner." The agent wrote to say he would prepare such an instrument. The testator died (but not suddenly or unexpectedly) without executing it :

Held, that the letter to the agent constituted mere instructions for a codicil, and could not be treated as a testamentary paper.—*Munro v. Coutts*, 1 Dow, 437.

See *Caton v. Caton*, L. R., 2 H. L., 127.

8. *Termination of Trust*.—A testator gave a sum of 3,000 l. to each of his three daughters; the principal to be paid to each on marriage with the consent of the testator's widow and one or more of his trustees. In case of marriage without such consent, the principal sum to go to the children of the marriage, on failure of them, to revert to the testator's estate. The testator made his son residuary legatee. After the testator's death the son assigned his contingent estate to one of the sisters. The widow and the trustees died :

Held, that as those whose consent to the marriage of any one of the daughters were dead, and as the son, who alone had a contingent interest in the portions, had assigned his interest to his sister, she and the other two sisters were entitled to take their portions and put an end to the trust.—*Grant v. Dyer*, 2 Dow, 73.

See *Collett v. Collett*, 35 Beav. 314.

9. *Heir—Resulting Trust—Perpetuity*.—Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether the testator intended that he should have it or not; for there is this distinction between the case of a devisee and that of an heir-at-law, that the devisee takes by force of the intent of the testator, and can only take what is given him by the will; whereas, the heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law. Therefore, where A. devised

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lands to his son B. for life, remainder to the first and other sons of B. in tail male, remainder to the second, third, and other sons of A. successively in tail male; and in case there should be no such issue male of A.'s body, or the same should become extinct, then to trustees for a term of 60 years, to retain the rents, &c., and apply them in the purchase of lands to be conveyed to such person as should then be in possession, by virtue of his will, of certain other estates therein mentioned, for life, with such remainders as would continue the estates as long as possible in the testator's name and blood; and after the trusts should be executed, or the term expired, the estate was limited to C. for life, with remainders over: and it happened that the person so in possession at the time when the conveyance could have been made of the lands to be purchased as above, was one not in existence at the time of A., the testator's death, and the uses were considered as in the event too remote and void :

Held, by the Lords, reversing a decree of the Court of Exchequer, that the consequence of the failure of the intermediate devisee was, not that the next devisee became entitled as if there had been no such intermediate devise, which was the opinion of the Court of Exchequer, but that the trusts of the lands to be purchased as above resulted to the heir-at-law.—*Tregonwell v. Sydenham*, 3 Dow, 194.

The Court of Exchequer appeared to consider the trusts of the term under the above circumstances as void in their creation. Lords *Redesdale* and *Eldon* seemed to consider them as only void in event.—*Id.*

See *Sugden's Law of Property*, 326 and 362, and note; *Martin v. Blagrove*, 25 Beav. 130; *Maynard v. Wright*, 26 Beav. 287.

10. *Heir—Resulting Trust*.—A testator seised of real and possessed of personal property, bequeathed various legacies "to be raised and levied from my properties by my executors." He then specifically

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devised certain lands, and afterwards said "the remainder of my properties I devise to my executors to make good the above sums. And I also ordain to and devise the said" (naming them) "to be executors to my last will and testament, and also my residuary legatees, to share and share alike."

Held (in the Court of Chancery in Ireland, and affirmed by the Lords), that there was a resulting trust as to the real estate for the heir-at-law.—*Kellett v. Kellett*, 3 Dow, 248.

11. *Younger Children*.—Devise and bequest of residue of testator's estates and property of every kind and nature whatsoever, both real and personal, of which he should be seised, possessed, or entitled to, at the time of his death, "to my eldest son *R. F. C.*" (who had then one younger child), "my daughter *A.*" (who had then several younger children), "and my daughter *C.*" (who was then unmarried), "and all their younger children, their heirs, executors, &c.; but nevertheless my intentions are that my said son *R. F. C.* shall have and receive the entire interest or yearly produce of such part of my said real and personal fortune as I by this my will intend for his younger children, during his life," and the same declaration was made as to each of the two daughters; the share of any child dying was to go to his or her younger children. If any child should die without leaving younger children, the share of the child so dying was to go to the survivors of the child, and the younger children, share and share alike. The three children were to have a power of distributing the fund at their pleasure among their younger children, and in failure of distribution "all my said children and grandchildren shall have equal shares of the said residuum," &c.:

Held, that the fund was at the time of the testator's death to be divided into three equal parts, one for each of his three children, who were to receive the interest for life, and then to be distributed among their children who took *per stirpes*, and

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not *per capita*.—*Odell v. Crone*, 3 Dow, 61.

Held also, that the younger children who came into existence after the testator's death were included, and were entitled to share, with the rest, their parent's portion.—*Id.*

See *Stokes v. Heron*, 12 Cl. & F. 161, 183; *Byng v. Byng*, 10 H. L. Cas. 573.

12. *Share of Legacy—Time of Division*.—A will directed the executors "to pay to each of my said children" (three daughters previously named) as and for their respective portions, a sum equal to one-fourth of what shall remain to my said son *William*, payable to my said daughters respectively at her or their respective ages of 21 or marriage."

Held, that the three daughters were only entitled to one sum of one-fourth of what remained to the son, or each of them only to one-seventh of such remaining sum.—*Colclough v. Gaven*, 3 Dow, 267.

Held also, that the time of the testator's death was that at which the amount of his property and the proportion of the shares were to be computed and estimated.—*Id.*

13. *Evidence to explain Words in a Will*.—A testator had lands in the manor of *Ashton*, and in *Ashton* parish, and also lands in several of the adjoining parishes. By his will he devised "my estate of *Ashton*." In ejectment evidence was tendered to show his mode of designating the whole of these lands in the parish of *Ashton*, and in the neighbouring parishes by the one phrase, "my *Ashton* estate."

Held, that this evidence was not admissible for such a purpose.—*Doe d. Oxenden v. Chichester*, 4 Dow, 65.

See *Ricketts v. Turquand*, 1 H. L. Cas. 472.

14. *Uncertainty*.—When a portion or share of a testator's estate is given over, it must distinctly appear on the face of the will what is the amount of the portion or share so to go over.

Therefore, when a testator gave his estate to *A.*, his eldest daughter for

WILL.—continued.

life, remainder to her first and other sons in tail male; remainder to her daughter *F.* for life; remainder to her first and other sons in tail male; remainder to the first and every daughter of *A.*, &c. Proviso: "But I give, devise, and bequeath all my said estates to my eldest daughter *A.* on this proviso, and express condition, that she marry a man really and *bonâ fide* possessed of property, at least equal to, if not greater than, the one I leave her; and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over, and be given to, my second daughter *F.*, to whom in that case I bequeath it:

Held (affirming the unanimous decision of the Exchequer Chamber), that the devise over (the specific portion given over not being stated) was void for uncertainty.—*Jones v. Hancock*, 4 Dow, 145.

See *Liddard v. Liddard*, 28 Beav. 268; *Edwards v. Jones*, 35 Beav. 475.

15. *Vested Remainders*.—Devise of freehold estates to *J. R.*, nephew and heir-at-law of testatrix for life; and on his decease "to and amongst his children lawfully begotten, equally, at the age of 21, and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of 21 years; and in case my said nephew shall die without lawful issue, or such lawful issue shall die before 21" then over:

Held, affirming a judgment of the Court of King's Bench, that the children of *J. R.* took a vested remainder.—*Randall v. Doe d. Roake*, 5 Dow, 202.

See *Duffield v. Duffield*, 1 Dow & C. 268-395; *Phipps v. Ackers*, 9 Cl. & F. 583; *Simmonds v. Cocks*, 29 Beav. 457; *Randfield v. Randfield*, 8 H.L. Cas. 225.

16. *Intestacy*.—Devise of real estate in trust to pay the clear rents, issues and profits, and in certain propor-

WILL.—continued.

tions to certain persons in the will mentioned, for life; and then testator proceeds to devise as follows: "And from and after the death of the survivor of them the said *L. S.*," &c. (naming the several persons to whom the above life interests were given) "then I give and devise all and singular the said manor, messuages, lands, &c. unto all and every the children of my late sister *E. C.*, by her three several husbands" (naming them), "that shall be then living, and their heirs and assigns for ever, equally to be divided between them as tenants in common, and not as joint tenants; and if there should be but one such child, and no issue of any of the other children then living, then, and in that case, I give and devise all my said real estates in Ireland unto such surviving child, his or her heirs and assigns for ever." The event which happened was, that at the death of the surviving annuitant, there was only one child of the sister *E. C.* then living, but that there was issue of several of the other children then living:

Held, by the House of Lords, in concurrence with the unanimous opinion of the judges attending, that there was an intestacy from the death of the surviving annuitant; the event which happened not having been provided for.—*Shuldham v. Smith*, 6 Dow, 22.

See *Eden v. Wilson*, 4 H. L. Cas. 257; *Gray v. Pearson*, 6 H. L. Cas. 61; *Ricketts v. Carpenter*. *Abbott v. Middleton*, 7 H. L. Cas. 72; *Russell v. Buchanan*, 2 C. & M. 573; *Franks v. Price*, 3 Beav. 200.

17. *Election — Mistake — Purchase for Value*.—When a will gave property in a manner similar to, but not quite the same as, a settlement, and then went on expressly to confirm the settlement:

Held, that this was not a case of election.—*Rancliffe v. Parkyns*, 6 Dow, 149.

18. *Father seised in fee of a manor and lands, &c. in R.*; by settlement on his second marriage, limits estates tail to the sons of the marriage in his lands, &c. in *R.*, without men-

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tioning the manor, the ultimate remainder in the lands to himself and his heirs. The father having still the manor of *R.*, and the reversion in fee of the lands, &c., and having two sons of the marriage, afterwards makes a will by which he devises all his manor and lands, &c. in *B.* and *R.*, to his sons for life, with remainders to their sons in tail. Expressions in the will from which, if there had been nothing to oppose that construction, it might be reasonably conjectured or concluded that the testator intended to devise immediate estates for life to his sons, not only in the manor which was his own, but in the lands, &c. in *R.*, in which they had estates tail under the settlement, and thereby to raise a case of election. But in the will he expressly ratifies and confirms the settlements, and everything therein contained:

Held, by the Court of Chancery, that this was not a case of election, and the judgment affirmed in *Dom. Proc.*

Lord *Eldon* (C.), observing that it is difficult in any case to apply the doctrine of election where the testator has a present interest in the estate devised, although it may not be entirely his own; and here he had a manor, and the reversion in fee of the lands; expressly confirmed the settlement in all its parts; and you cannot, as against that express declaration of intention to the contrary, take it by conjecture, call it demonstration plain, necessary implication, or what you will, but still only conjecture, that he does not mean to confirm. — *Rancliffe v. Parkyns*, 6 Dow, 149.

A. by will, dated 1735, devises all his real estates in these general words to his daughter *I.* for life, remainder to her first and other sons in fee. Marriage of *I.* and *B.* (*B.* having no notice of the will) and petition in 1746 to Parliament for an Act to enable them to make a settlement, they being minors, in which petition *I.* is represented as entitled in fee to certain estates which had belonged to her father *A.*; an Act passed and settlement made on that ground. *B.*, by settlement made in 1776, gives considerable interest to

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C., his eldest son by his wife *I.*, which *C.* could not otherwise have in his father's life-time. Will of *A.* of the existence of which the parties had been before ignorant, discovered in 1799; a bill in 1800 by *C.* claiming the estates under the will of *A.*, his grandfather, as eldest son of *I.*, dismissed in Chancery without costs. The decree affirmed under the circumstances; it being uncertain whether the estates in question passed under the general words in the will of *A.*, and whether the representation to Parliament might not have been correct; *B.* honestly believing that he was a purchaser for value, so long a time having elapsed, &c.—*Rancliffe v. Parkyns*, 6 Dow, 149.

See *Garner v. Holmes*, Cas. temp. Nap. 143; *Wintour v. Clifton*, 21 Beav. 448; *Colyer v. Finch*, 5 H. L. Cas. 930; *Phillips v. Phillips*, 31 Law Jour. (Ch.) 321.

19. *Charge of Debts.*—*A.* by will gave to *J. W.*, his sister, all his lands and heritages on life rent, also all debts and sums of money heritable and moveable that should be due to him at his death, and all other his moveable subjects. His lands he gave, after the decease of his sister, to the appellants, his nephews, but he declared that his sister "shall be bound and obliged, as by acceptance hereof she binds and obliges herself, to pay all my just and lawful debts, with my funeral charges and expenses, and any gifts or legacies I may think proper to leave by a writing under my hand." The moveable property turned out to be insufficient to pay the debts. The sister applied against the nephews for the sale of so much of the lands as would discharge the balance. That relief was denied her in the Court of Session:

Held, that the decree of the Court below was erroneous, for that the disponent, although he intended that his sister should have the life-rent free, having expressly subjected her alone to the payment of his debts, she became liable to them to the amount at least of the benefit she derived from his disposition.—*Waddell v. Waddell*, 6 Dow, 279.

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1. *Two Testamentary Papers.*—Where two testamentary papers were left by a testator, held by the Lords affirming a decision of the Vice Chancellor, that from a similarity of form and expression, and of the annuities, legacies, and gifts contained in them, the latter was for the greater part, if not wholly, a substitute for the former.—*Hemming v. Gurrey*, 1 Dow & C. 35.
22. *Undue Influence.*—Where an undue influence is exercised over the mind of a testator in making his will, the provisions in the will, in favour of the person exercising that influence, are void; but the will may be good as far as respects other parties. So that a will may be valid as to some parts, and invalid as to others; may be good as to one party, and bad as to another.—*Lord Trimlestown v. D'Alton*, 1 Dow & C. 85.
23. *Charge.*—Devise to *A.* for life, remainder to his first and other sons in tail, remainder to *B.* for life, remainder to certain of his sons for life, remainder to their first and other sons in tail in their order; proviso, that if *B.*, or any of his sons, should become entitled, the estate should be charged with a sum of 2,000 l. for *C.* A grandson of *B.* is the first of *B.*'s family who become entitled in possession, and this held sufficient to support the charge for *C.*—*Lord Lorton v. Gore*, 1 Dow & C. 191.
24. *Trust Power—Younger Children—Heir—Age and Name.*—*G. E.* devises his estates at *S.* and *H.* to trustees, in trust, "in case there should be but one son of my daughter who shall attain the age of 21 years, for such son, his heirs and assigns for ever; and in case there shall be two or more sons who shall attain the age of 21 years, then in trust for such of the daughters (if any) as shall attain the age of 21 years, or before that be married with consent of the trustees, her heirs and assigns for ever, &c." And as to the residue of

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the property, of whatever description, which the testator should be possessed of or entitled to at the time of his death, in trust, to convert the whole into money, and invest the produce in the funds for the benefit of testator's daughter's children, in the manner in the will mentioned; and the testator empowered the trustees to apply what should appear to them to be a competent part of the rents, profits, and proceeds of the estates and funds, for the maintenance of such of the children as should be presumptively entitled, during their minority.

Testator having, after making his will, purchased some additional freehold property, executed a codicil by which he revoked that part of his will which directed the sale of his residuary freehold property, and directed "that the son of my daughter who shall first attain the age of 21 years, shall, on attaining that age, change his name for that of *Ethoes*; and I devise to such son, on his attaining the age of 21 years, and changing his name to *Ethoes*, all my freehold property, lands, &c., his heirs and assigns for ever."

No son of testator's daughter by her said husband during his infancy, and no daughter during her infancy and non-marriage, entitled to the rents and profits of the *S.* and *H.* estates.—*Duffield v. Duffield*, 1 Dow & C. 268.

If the younger of the two sons should die in infancy, the elder would not be entitled to such rents and profits during his infancy, and a third son becoming a second son would not be entitled to such rents and profits during his infancy.—*Id.*

The rents and profits during the infancy of the sons, and the infancy and before marriage of the daughters, belong to testator's heir-at-law.—*Id.*

As to the maintenance, there being two sons, infants, at the time of testator's death, the trustees should execute the power of applying part of the rents and profits of the premises first demised to the maintenance to the second of such sons during his infancy; and in case the second son died in infancy, and the elder be-

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came an only son, the trustees should apply part of such rents and profits to his maintenance during his infancy; and in case a third son should be born during the infancy of the first, the maintenance for the first son to cease, and part of the rents and profits to be applied for the maintenance of such third son; and supposing there were an only son and an infant unmarried daughter, the trustees would have no power to apply any part of the rents and profits to the maintenance of such daughter during her minority.

No son of testator's daughter's is entitled to the freehold estates mentioned in the codicil until his attaining the age of 21 years and assuming the name of *Elwes*; and until the happening of both events, the rents and profits of such estates belong to testator's heir-at-law.

Per Lord Eldon (Lord Chancellor): I hope this will be a leading case.—*Duffield v. Duffield*, 1 Dow & C. 268.

See *Evers v. Challis*, 7 H. L. Cas. 541.

25. *Specific Devises—Legacies.*—*J. S.* devises to his son, *T. S.*, certain real estates specifically, and charged with certain specific burdens, and bequeaths certain pecuniary legacies, and makes his real and personal estates liable to the payment of the legacies, and makes *T. S.* his residuary devisee and legatee, and sole executor:

Held, by the Lords, reversing a decree of the Lord Chief Baron of the Exchequer, that the real estates specifically devised to *T. S.* were not liable to contribute to the payment of the pecuniary legacies.—*Spong v. Spong*, 1 Dow & C. 365.

See *Conron v. Conron*, 7 H. L. Cas. 175.

26. *Absolute Gift—Substitution.*—A testator bequeathed all his personal property, not before disposed of by his will, in trust for his five sons "and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided among them in equal shares and proportions; the shares of such of them as shall have

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attained the age of 21 to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of 21 years to be paid to them when and as they shall respectively attain such age":

Held, that this bequest was an absolute gift to each of the sons of the fifth part of the property thus bequeathed, and that if any of the sons had died before the testator, the issue of such son would take his share by substitution.—*Pearson v. Stephen*, 2 Dow & Cl. 328.

See *Wordsworth v. Wood*, 1 H. L. Cas. 129; *Martin v. Holgate*, L. R., 1 H. L., 183.

27. *Intention—Revocation.*—Where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest; if there was only a reasonable doubt the first devise ought to stand. A testator devised his copyhold messuage called *Plomer Hill House* with the appurtenances to trustees in trust for his wife for life, and, subsequently, by one of several codicils, revoking several of the dispositions made by his said will of all his freehold, copyhold, and personal estate, he, instead of such dispositions, devised all his freehold, copyhold, and personal estate to his daughter:

Held, that the devise of the estate to his wife for life was not affected by this codicil.—*Hearle v. Hicks*, 1 Ol. & F. 20.

See *Doe d. Brodbelt v. Thomson*, 12 Moo. P. C. 123; *Robertson v. Powell*, 2 H. & C. 762; *Re Arnold's Estate*, 33 Beav. 167; *Thornhill v. Hall*, 2 Cl. & F. 22; *Randfield v. Randfield*, 8 H. L. Cas. 230.

28. *Election.*—In order to raise a case of election on a testamentary instrument, the intention of the testator must clearly impose an obligation to elect; and in order to hold a party to have made election, his acts must be conformable to the instrument imposing the obligation to elect, and not adverse thereto.

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Where parties may elect between two titles, either as tenants for life or tenants in fee-simple, and continue in possession for near 44 years, executing in the meantime various deeds, reciting that they took under the former title :

Held, that they have elected to take under that title, and their heir-at-law is precluded from claiming the fee under the latter.—*Dillon v. Parker*, 1 Cl. & F. 303.

See *Spread v. Morgan*, 11 H. L. Cas. 588; *Sugden's Law of Property*, 453, n.

29. *Perpetuity*.—A limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of 21 years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of 21 years be added the number of months equal to the longest or ordinary period of gestation.

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of 20 years from the decease of the survivor of 28 persons who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly. — *Cadell v. Palmer*, 1 Cl. & F. 372.

See *Cole v. Sewell*, 2 H. L. Cas. 232; *Pownall v. Graham*, 33 Beav. 245.

30. *Devise—Cutting Down*.—It is a rule of the Courts, in construing written instruments, that when an interest is given, or an estate conveyed, in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.

A testator recites *seriatim* in his will

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the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son *R.* part of the profit rent of *Blackacre* during the term of the lease, which was for the lives of the testator and of *R.* and another, and devising to his unmarried daughters *nominatim* different parts of the rents of *Whiteacre*, in addition to equal shares, given to them by the preceding clause, in the rents of another estate; "and farther, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them":

Held, that the devise to *R.* in *Blackacre* was for the whole term of the lives of the *cestuis que vires*, and was not, on *R.*'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last mentioned unmarried daughters only.—*Thornhill v. Hall*, 2 Cl. & F. 22.

See *Biddulph v. Lees*, E. B., & E. 312; *Young v. Turner*, 1 B. & S. 550; *Wright v. Wilkin*, 2 B. & S. 244; *East v. Twyford*, 4 H. L. Cas. 517; *Grey v. Friar*, 4 H. L. Cas. 565; *Key v. Key*, 4 De G., M., & G. 73.

31. "*All and every Other*"—*Implication*.—*J. L.* devised his manors and hereditaments to trustees upon trust to convey the same to the use of *J. H. L.* (his eldest son) for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and *all and every other*, the son and sons of the body of *J. H. L.*, severally and successively, in seniority of age and priority of birth, in tail male; remainder to the use of devisor's second and other sons successively in tail male; remainder to the use of *J. H. L.*'s first, second, third, fourth, fifth, and all and every other daughter and daughters successively in tail general; remainder to the use

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of devisor's eldest daughter, *M. S. L.*, for life; remainder to trustees to preserve, &c.; remainder to the use of the first, second, third, fourth, fifth, and all and every other son of *M. S. L.*, successively in tail male; remainder to her first, second, and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust.

There was no express limitation to *J. H. L.*'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be in case there should be no son of *J. H. L.*, for raising portions for his daughters, except an eldest or only daughter; and the trusts of the other terms were to be for raising portions for the younger children of the successive tenants for life, in case there should be no issue of the body of *J. H. L.*; and a power was directed by the devisor to be inserted in the settlement to enable *J. H. L.* to charge the devised estates with portions for his children other than an eldest or only son:

Held, that the first son of *J. H. L.* was entitled to have an estate tail in the devised manors and hereditaments expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees. — *Langston v. Langston*, 2 Cl. & F. 196.

See *Ricketts v. Carpenter*, 7 H. L. Cas. 72; *Guardhouse v. Blackburn*, L. R., 1 P. & D., 110; *Eastwood v. Lockwood*, L. R., 3 Eq., 491; *Surtees v. Hopkinson*, L. R., 4 Eq., 103.

32. *Failure of Issue — Remoteness.* — A testator bequeathed 20,000 l. to *C. H.*, his natural daughter; but in case of her death, "without lawful issue," he willed the money so left to be equally divided betwixt his nephews and nieces "who may be living at the time." He also left to *C. A. H.*, his niece, 3000 l.; but in case of her death without issue, to revert back, and be divided betwixt his nephews and nieces who

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might then be living. The residue of his property he directed to be divided into 15 shares, to be for his other 15 nephews and nieces, after the deaths of their parents respectively. *C. H.* and all the nephews and nieces survived the testator, and *C. H.* died some time after, under age and unmarried, having made a will bequeathing the 20,000 l.

Held, that *C. H.* took an absolute interest in the 20,000 l., and that the limitation over was void for remoteness. — *Candy v. Campbell*, 2 Cl. & F. 421.

See *Towns v. Wentworth*, 11 Moo. P. C. 541; *Webster v. Parr*, 26 Beav. 237; *Jenkins v. Hughes*, 8 H. L. Cas. 571.

33. *Timber—Waste.* — Where *A.* was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage:

Held, that he was guilty of equitable waste, and an account was directed, and an injunction granted. — *Newdigate v. Newdigate*, 2 Cl. & F. 601.

34. *Vesting of Chattels.* — *Vere*, Lord Vere bequeathed certain chattels to trustees, in trust to his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant and unmarried, leaving the second grandson of the testator surviving him:

Held, by the Lords, ~~expressing~~ a de-

WILL—continued.

oree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title.—*Tollemache v. Coventry*, 2 Cl. & F. 611.

See *Gosling v. Gosling*, 1 De G., J., & S. 9.

35. *Estate Tail—Cutting Down.*—Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase:

Held accordingly, that under a devise to “*W. F.* and his heirs male, according to their seniority and their respectively attaining 21, the eldest son surviving of the said *W. F.*, and the heirs male of his body, to be preferred to the second or younger son; and in case of failing of issue male of *W. F.* surviving him, or dying without lawful issue male attaining 21, then over;” an estate tail was devised to *W. F.*—*Fetherston v. Fetherston*, 3 Cl. & F. 67.

See *Cole v. Sewell*, 2 H. L. Cas. 186; *Parker v. Tootal*, 11 H. L. Cas. 153.

36. *Debts—Exoneration of Personal Estate.*—A deed of settlement was made in contemplation of marriage, and contained a proviso by which the estates, &c. thereby granted, should in the first place be charged with certain portions therein mentioned, due to the brothers and sisters of the settlor, and with certain debts set forth in a schedule thereunto annexed. The covenant against incumbrances specially exempted a jointure to the settlor's mother, and the before-mentioned portions and debts, and the covenant for farther assurance contained an exemption similar to the foregoing, by an express reference to it. The settlor was pos-

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sessed of other estates besides those settled. The settlor after his marriage paid off some of the portions and some of the debts, and by his will declared such payments to be in case of his settled estate:

Held, by the House of Lords, reversing a decree of the Court of Chancery in *Ireland*, that all rights must be taken to be as they were established at the date of the conveyance, and therefore neither any directions in the will of the settlor, nor the state of his affairs at his decease, could alter its construction; and consequently that the debts, &c., continued to stand as a burden on the real estates, and that the personal estates were exonerated in the hands of the executors.—*Vandeleur v. Vandeleur*, 3 Cl. & F. 82.

37. *Rent Charge—Merger.*—By a marriage settlement certain freehold lands, together with the mansion-house and park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, 1000*l.* a year, clear from all deductions whatever. The settlor by his will confirmed the settlement, and gave the mansion-house and park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in *England* and his estates in *Pennsylvania*, the latter free from all incumbrances whatever; he created two rent-charges, payable out of his real estates in *England*:

Held, that the devise to the wife of the lands charged by the settlement was not intended to merge the charge in the settlement, and that she was therefore entitled to enjoy the mansion-house and park without any deduction being on that account made from the annuity which was to be raised entirely out of the other *English* estates held by the nephew.—*Powell v. Grigby*, 3 Cl. & F. 103.

See *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Miltown v. French*, 4 Cl. & F. 295.

38. *Heir—Residue—Vested Interest.*—A testator devised all his freehold, copyhold, and leasehold messuages, lands, tenements, rents, and here-

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ditaments, and all other his real and personal estate, whatsoever and wheresoever, not before disposed of, to trustees, with power to sell and absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey and assure that part to his godson, *G. H. A.*, when and so soon as his godson should attain 21; and also to pay to *G. H. A.* 7000*l.* upon his attaining 21. But in case *G. H. A.* should die without issue before attaining 21, then the said part of the real estate, together with the 7000*l.*, was to sink into and become part of the residue, and to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, and remainder of his personal estate, he directed it to accumulate at compound interest until *J. C. A.* should attain 24 years, then upon trust to convey, assign, &c., unto *J. C. A.* (upon his giving such security, and executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees) all the legal estate and interest of and in all the freehold, leasehold, and copyhold lands, tenements, rents, and hereditaments, and all other the testator's real and personal estate, whatsoever and wheresoever, not thereinbefore devised and bequeathed:

Held, that this gift to *J. C. A.* displaced the heir-at-law as to the residuary gift of real and personal estate; that *J. C. A.* took a vested interest in the intermediate rents and profits, and that the words respecting his executing deeds and assurances did not constitute a condition precedent.—*Ackers v. Phipps*, 3 Cl. & F. 665.

See *Livesey v. Livesey*, 2 H. L. Cas. 419; *Simmonds v. Cocks*, 29 Beav. 457; *Simmons v. Rose*, 6 De G., M., & G. 411.

39. *Executory Devise—Vesting*.—A testator devised and bequeathed all his real and personal estate to trustees in trust, as to his lands in *W.*, to convey them to *G. H. A.*, when and so soon as he should attain his age of 21 years; and also to pay him

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7,000*l.* upon his attaining that age; but in case he should die under 21 without leaving issue of his body, then the lands in *W.* given and devised to him together with the 7000*l.* should sink into the residue of the testator's real and personal estate and go over. *G. H. A.* attained his age of 21 ten years after the testator's death. Did *G. H. A.* take a vested interest in the lands in *W.*, on the testator's death, or was it contingent until he attained 21? And did the rents and profits arising from these lands in the meantime belong to him or to the testator's heir-at-law? — *Phipps v. Ackers*, 3 Cl. & F. 702.

The questions here put were not answered. Judgment was postponed *sine die*. The case came on again in 1842. The head-note stands thus—

40. *Executory Devise—Vesting*.—A testator gave all his real and personal estates to trustees, and as to his lands at *W.*, which he held in fee simple, he directed that the trustees should stand seised thereof in trust to convey the same to *G. H. A.*, when and as soon as he should attain his age of 21 years; but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at *W.* given and devised to him, should sink into the residue of the testator's real and personal estates; and he gave the residue to *J. C.* At the testator's death *G. H. A.* was only 12 years of age:

Held, that an equitable estate in fee in the lands at *W.* vested in *G. H. A.* immediately on the testator's death, liable to be divested in the event of his dying under 21 without leaving issue of his body.—*Phipps v. Ackers*, 9 Cl. & F. 583.

See *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Randfield v. Randfield*, 8 H. L. Cas. 225.

41. *Charitable Purposes—Uncertainty*.—*A. B.*, by trust deed of settlement, gave all his estate, real and personal, to trustees, with power to keep up the trust by assumption of new trustees; and he directed them to put out on security 2000*l.*, and pay

WILL.—continued.

the interest to *M. M.* for her life, the said sum itself payable to the trustees on her death; and he directed them to apply the residue of his estate to such benevolent and charitable purposes as they should think proper; and if the same should amount to 600 *l.* or upwards, he recommended to his said trustees and their foresaids, to vest the same in themselves and apply the proceeds in yearly payments to faithful domestic servants settled in *Glasgow*. And if the residue should not amount to 600 *l.* he authorised his said trustees to distribute the same to such charitable and benevolent purposes as they should think proper. The residue was found to amount to 12,000 *l.* :

Held, first, that the words, "the said sum itself payable to the trustees on her (*M. M.*'s) death," did not give the 2000 *l.* to them beneficially, but it became part of the general estate; secondly, that the bequest of the residue was not void for uncertainty; and thirdly, that the costs of all the parties ought to be paid out of the residue, as the instrument was obscurely worded, and the residue was so much larger than the disponent expected.—*Miller v. Rowan*, 5 Cl. & F. 99.

42. *Uncertainty*.—A direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and for no other use, intent, or purpose :

Held, void for uncertainty.—*Williams v. Kershaw*, 5 Cl. & F. 111, n.

43. *Accumulation*.—A testator devised his freehold and copyhold estates, charged with annuities for his sons and daughter, upon trust, to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain 21, when the accumulations were to be divided among such of them as should be then living; and he directed that in case any of his sons and daughter should be living after the youngest of his grand-

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children should have attained 21, the residue of the said rents and profits should be farther accumulated, and such accumulation divided among his grandchildren who should be living at the death of the survivor of his sons and daughter; and charged as aforesaid, he directed that after the death of such survivor his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of them, in equal proportions of so much money as would in fifteen years make 30,000 *l.*, which sum, with the interest thereof, should be equally divided among all his grandchildren who should live to attain the age of 21, their executors or administrators. The testator died in 1812, leaving ten grandchildren, nine of them children of one of the annuitants. All of them lived to attain 21, the youngest having attained that age in 1830. The last survivor of the testator's sons and daughter died in 1831 :

Held, that the charge of two-thirds of the produce of the estates was a provision for accumulation, within the Act 39 & 40 *Geo. 3*, c. 98, and therefore void so far as it extended to any period after the expiration of 21 years from the testator's death.—*Evans v. Hellier*, 5 Cl. & F. 114.

44. *Creation of Trust*.—A testator devised certain real estates to trustees for the use of *W. S.* for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. The will then contained this proviso, "And it is also my particular desire that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend *W. S.*, when he shall enter into the receipt and perception of my said rents of *K. V.* and *K.*, shall continue the said *B. E. L.*, in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained,

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at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction."

Held, by the House of Lords, reversing the judgment of the Court below, that these words did not create a trust in favour of *B. E. L.*—*Shaw v. Lawless*, 5 Cl. & F. 129.

45. *Annuity—Creditors—Purchase.*—*D.*, by indenture in 1799, demised all his estates in *Ireland*, of which he was seised for life, to trustees for 99 years, on trust to pay him an annuity of 10,000 *l.*, and to apply the residue of the rents and profits in payment of his debts. He soon after received the rents to his own use, excluding the trustees' receiver; and in 1819 he joined his eldest son *B.*, the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees among other trusts, to pay *B.* two annuities of 5000 *l.* and 1000 *l.* during *D.*'s life, with power to *D.* to charge the estates with 217,000 *l.*, and power to *B.* to charge them with 100,000 *l.* to be raised after *D.*'s death. *B.* assigned his annuities and charge of 100,000 *l.* to *W.* to secure the repayment of monies advanced. In 1835 *W.* filed a bill in *Ireland* against *D.* and *B.* and others for enforcing these securities. Some of *D.*'s creditors, who in a suit instituted there in 1828, had obtained the benefit of a suit pending in *England* against him and the trustees of the deed of 1799, for carrying the trusts thereof into execution and a receiver over the trust estates, being made defendants to *W.*'s bill, claimed by their answer to be first incumbrancers on *D.*'s annuity of 10,000 *l.* to the amount of the rents received by him above that sum in breach of the trusts of the deed of 1799:

Held, that as *D.*'s creditors in their suit never sought to attach his annuity before he granted the annuities out of it to *B.*, but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, *B.* being no party to them, was by the deed of 1822 a purchaser for valuable considera-

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tion, without notice; that his two annuities were well charged on *D.*'s annuity of 10,000 *l.*; and *W.*, as *B.*'s assignee, was a prior incumbrancer.—*Houlditch v. Wallace*, 5 Cl. & F. 629.

46. *Codicil—Residue—Revocation.*—A testator by his will gave the residue of his personal estate to his wife for her life, and after her decease, to Sir *C. E. D.*, absolutely. He subsequently, by a codicil, which did not affect the gift of the residue, altered his will in some respects, and confirmed it in all others. Next day he made a second codicil, by which he gave some pecuniary and specific legacies, and concluded thus: "All the rest and residue of my property, not hereinbefore (or by my will or any other codicils) disposed of, I give and bequeath to my nephew, *C. P. Y.*, and to Sir *C. E. D.*, their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them:"

Held (Lord *Cottenham*, Lord Chancellor, *diss.*), that the above clause of the second codicil was a revocation of the gift, by the will, of the residue to Sir *C. E. D.*, and that he was accordingly only entitled to an equal share thereof with *C. P. Y.*—*Hardwicke (Earl) v. Douglas*, 7 Cl. & F. 795.

47. *Charges—Residue—Surplus.*—A testator gave his whole estate to trustees to sell, and after payment of debts, expenses, and certain legacies, to pay out of the residue two annuities of 400 *l.* each to *F.* and *P.*, and one of 200 *l.* to *B.*, for their respective lives. And for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; and if the residue should not be sufficient, to vest whatever residue might be, and pay the dividends to the annuitants, in the same proportions; and if more than sufficient, to vest the surplus, and divide it and the capital sums set apart for the annuities, as the same should become tangible by the death of each annuitant, among residuary legatees. *B.* predeceased the testator. The residue did not yield

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sufficient income every year to pay *F.* and *P.* 400*l.* each. On *F.*'s death, *P.*, and *F.*'s personal representatives, claimed payment of all the arrears out of the then enlarged income of the residue :

Held, by the Lords (varying interlocutors of the Court of Session), that *F.* and *P.* were entitled to payment of 400*l.* each only in those years in which the income of the residue was sufficient; that when in any year that income was more than sufficient, the excess belonged to the residuary legatees; that on *F.*'s death, half the capital of the residue became divisible among them, and then *P.* became entitled to the income, in each year, of the other half; but when in any year this income exceeded 400*l.*, the excess belonged to the residuary legatees, and neither *P.* nor *F.*'s representatives were entitled to any payment of arrears.—*Casamajor v. Pearson*, 8 Cl. & F. 69.

No benefit accrued to the residuary legatees from the lapse of the annuity to *B.*, except when thereby the income of the residue exceeded the amount of the two subsisting annuities.—*Id.*

48. *Bequest of Legacy.*—A testator bequeathed to trustees a sum of 15,000*l.*, in the 3 per Cent. Consols, to be deemed a legacy of quantity, and to be due at his death, as if the same was a specific legacy; and he directed that if he should not die possessed of 3 per Cent. Consols sufficient to satisfy the said sum, his executors should, within two months after his decease, purchase so much Consols as should make up the deficiency or full amount thereof, as the case might require; and he created a term in his real estates, one trust of which was to raise the full amount of deficiency of the said sum of Consols, in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was dated in 1832, the testator died in 1835, having only 3000*l.* 3 per Cent. Consols, which had been purchased in 1834; he had, in 1824, sold out 12,000*l.* Consols which then stood in his name,

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and paid the produce to his brother, upon mortgage of freehold estates, subject to redemption by retransferring or replacing, on request, 12,000*l.* Consols in the name of the testator or his executors, and payment of interest equal to the dividends until replaced :

Held (affirming the Vice Chancellor's and Lord Chancellor's decrees), that the 12,000*l.* Consols secured by the mortgage to be replaced were well bequeathed to make up the legacy of 15,000*l.* 3 per Cent. Consols.—*Coltson v. Curling*, 9 Cl. & F. 88.

49. *Interest in Lease.*—*B. B.*, being seised of certain lands at *K.*, in the county of *C.*, demised them to *S.* for three lives; *S.* agreed to assign the lease for lives to *T. G.*, and *T. G.* entered into possession of the lands, and obtained from *B. B.* a lease of the same lands for 999 years, at a peppercorn rent during the continuance of the lease for lives, and afterwards at 100*l.* a year. *T. G.* having these interests in the lands, made his will, in which was the following clause: "I order all my freehold interests in the county of *C.*, &c., except my interest in *K.*, which I hold under *B. B.*, to be sold, and the money arising, &c. to be divided":

Held, affirming the decrees of the Court of Chancery of Ireland, that *T. G.*'s interest in the lease for lives was disposed of by this clause in the will.—*Gurly v. Gurly*, 8 Cl. & F. 743.

50. *Remainder*—"First Male Heir."—*E. C.*, by his will, dated in 1786, gave his estate of *T.* to certain persons for life, and after their decease to his kinsman, *J. C.*, or his male heir, and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of his uncle *R. C.*'s family, yielding and paying to such of the daughters of the aforesaid *R. C.*, which should be then living, the sum of 100*l.* each at the time of taking possession of the aforesaid estates. The testator died in 1787; *R. C.* died six years before, having left five daughters only, all married; the eldest had several daughters, but no son; each of the

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others had sons; all these persons were known to the testator.

J. C. died in 1808, without leaving a son lawfully begotten.

The eldest daughter of *R. C.* died in 1799, having no son, but leaving a daughter who had a son born in 1795, both still living.

The third died in 1813, leaving two sons; one born in 1771, who died in 1813; the other, born in 1773, still living.

The fourth died in 1804, leaving a son, born in 1768, who died in 1819, having devised to his wife in fee.

The fifth, still living, had a son, born in 1772, who is still living.

The life estate in the devised lands expired in July 1820:

Held, 1. That the remainder devised to the first male heir of the branch of *R. C.*'s family, was a contingent remainder in fee simple.

2. That such remainder, if once vested, could not become divested so as to admit another in preference to him in whom it had vested.

3. That the said remainder did not vest in *R. C.*'s second daughter's son.

Quære, as between the titles of the grandson of *R. C.*'s eldest daughter, and the son of *R. C.*'s fourth daughter?

Lord *Brougham* was of opinion, supported by five judges—

1. That the words "first male heir," were not used by the testator to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor in the technical sense.

2. That the said remainder first vested in interest, on the death of *R. C.*'s fourth daughter, in 1804, and vested in her son.

Lord *Cottenham*, supported by six judges, was of opinion—

1. That the words "first male heir," were used to denote a person of whom an ancestor might be living.

2. That the said remainder did not vest in interest in *R. C.*'s fourth daughter's son. (His Lordship did

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not say when or in whom it vested. Two of these judges said it vested in the first daughter's grandson, on that daughter's death in 1799; two others said it then vested in *R. C.*'s second daughter's son; and the remaining two said that the will was in that respect void for uncertainty). —*Dos d. Winter v. Perratt*, 9 Cl. & F. 606.

See *Thellusson v. Rendlesham*, 7 H. L. Cas. 429.

51. *Power or Direction to Sell*.—A testator devised, by two testamentary papers, his real and personal estates to trustees. In the first paper he declared the trusts, and among others he created a power of sale in the following terms: "to sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments and others hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit." To render these sales effectual, he granted full power to convey, &c. The paper then went on thus: "Declaring always, &c., that my said trustees shall, by their acceptance hereof, be bound and obliged after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts," &c. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and moveable estates to trustees on the trusts therein mentioned: "Amongst others, my trustees are required to turn my means and effects thereby conveyed in trust into money." And he gave directions accordingly, adding, that in case he should die leaving an heir of his body, he directed his trustees to employ the trust funds for the use of such heir; that as soon as such heir should attain majority, or be married, the trustees should denude themselves of the whole trust and funds in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same:

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Held, that the testamentary papers must be construed as amounting not merely to a power of sale for the purposes of the trust, but to a positive direction to sell, in case the testator should die without leaving any heir of his body living at the time of his death.—*Williamson v. The Lord Advocate*, 10 Cl. & F. 1.

52. *Attestation*.—Lands were limited to such uses, &c., as *L. H. W.* should appoint by her last will and testament, in writing, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses. *L. H. W.* signed and sealed an instrument (before statute 1 Vict. c. 26) containing an appointment commencing thus: "I, *L. H. W.*, do publish and declare this to be my last will and testament," and ending thus: "I declare this only to be my last will and testament; in witness whereof I have, to this my last will and testament, set my hand and seal, the 12th day of September, &c. The attestation was this, *C. B.*, *E. B.*, *A. B.*":

Held by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the judges), that the attestation was sufficient, and that the power of appointment was well executed.—*Burdett v. Spilsbury*, 10 Cl. & F. 340.

See *Newton v. Ricketts*, 9 H. L. Cas. 262.

53. *Estate taken—Legacies*.—A testator left all his personal estate, subject to legacies, and all his houses, gardens, parks, and woods, and all his landed estates, to his wife for her life, and then to the eldest son of *G. B.*, and afterwards to *G. B.*'s second, third, or any later sons he might have by the testator's niece *A.*, and then to the eldest son, and other sons successively, of the Earl of *B.*, by the testator's niece *C.*; but all these to be subject to out-payments and legacies by the testator's will given; and if they and the conditions of his will were not complied with exactly, he left all the advantages of it to the next person in succession, subject to the legacies,

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and so on, unless they were discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the non-payment of which he declared repeatedly, and in various forms of expression, that the persons taking his personal estate should be subject to the penalties in the will. *G. B.* had several sons living at the death of the testator:

Held, that the eldest son of *G. B.* took the personal estate absolutely, subject to the prior life estate, and to the legacies and annuities given by the will and codicils.—*Hoare v. Byng*, 10 Cl. & F. 508.

54. *Annuities—Legacies—Priority*.—A testator gave his wife his freehold estate of *B.*, and certain specific chattels; and also an annuity for her life, charged upon all his real estates (except *B.*), with power of distress for the same; the first payment thereof to be made on the 1st of May or November which should first happen after his decease. The next charged his debts upon his real estates (except *B.*), in aid of his personal estate, and gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He then gave several pecuniary legacies to nieces and others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate; and in case of deficiency thereof, to be raised and paid by them, as they should think proper, out of his real estates (except *B.*) and he charged the same therewith. He lastly gave two annuities to his servants in similar terms to those used respecting the preceding annuities. The personal estate was exhausted in payment of the debts, and the real estate was insufficient for the annuities and legacies:

Held, upon the true construction of the provisions of the will, that the annuities were entitled to priority over the legacies.—*Creed v. Creed*, 11 Cl. & F. 491.

See *Conron v. Conron*, 7 H. L. Cas. 177; *Sugden Law of Property*, 428.

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55. *Estate in Fee Absolute—Trust.*—*R. P. K.* being entitled, under a settlement and will of his grandfather, to real estates in tail male, with remainders to his cousins in tail, with remainder to himself in fee as right heir of the settlor, suffered a recovery, and acquired the fee-simple. He had other estate in fee-simple by purchase, and considerable personal estate. He by his will gave all his estates, real and personal, to his brother, *T. A. K.*, if living at his own decease, and if not, to *T. A. K.*'s son, *T. A. K.* the younger; and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother, and his next descendant in the direct male line; but in case no such issue or descendant of his said brother or nephew should be living at the time of the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator inherited those estates, subject in every case to certain reservations out of the rents; and he appointed the person who should inherit his said estates under his will his sole executor "and trustee, to carry the same and everything contained therein duly into execution, confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words." He then, after giving some legacies, bequeathed his gems and other articles to the *British Museum*, "on condition that the next descendant in the direct male line then living of his said grandfather, should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line." And he concluded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts; and to their justice, in continuing the estates in the male suc-

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cession, according to the will of the founder of the family, my above-named grandfather."

- T. A. K.* survived the testator, and died without leaving any son.

Held, that *T. A. K.* took the estates in fee absolutely, and that no trust was, or was intended to be, created by the will; a discretion being left to the devisees to defeat the testator's expressed desire.—*Knight v. Boughton*, 11 Cl. & F. 513.

Semble, that the property to which the words of desire applied, and the nature of the estate to be taken in it, were too uncertain to raise a trust. *Per Lord Lyndhurst* (Lord Chancellor).—*Id.*

See *Eaton v. Watts*, L. R., 4 Eq., 153.

56. *Residuary Legatees—Devise over.*—

T. settled his freehold estates (subject to appointment) on himself in tail, remainder to *J. L.* and his sons in strict settlement, remainder to *L. C.* for life; provided that if *J. L.*, or any issue male of his body, should become entitled in possession to his father's family estates, then the uses before declared of *T.*'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled were dead, without issue male.

J. L. having afterwards become entitled in possession to his father's family estates, *T.* by his will appointed his said estates to *J. H. L.* (the eldest son of *J. L.*) and his sons in strict settlement, remainder to the heirs of *H. H.* deceased, provided that if any tenant for life in possession under the will should become entitled in possession to *J. L.*'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estates upon such trusts as would nearest correspond with the uses

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and trusts of his freehold estates, and then gave all the residue of his real and personal estates to *S. M. and W.*, their and each of their heirs, executors, &c. absolutely, in equal third parts, &c.

On the testator's death in 1824, *J. H. L.* entered upon his estates under the will; and in 1833, he became entitled in possession to *J. L.*'s family estates; and had no son. A bill was filed by the residuary legatees, claiming the rents of all the estates accruing between 1833 and *J. L.*'s death, or his having a son, against *H. H.*'s heir, who claimed the same rents, and against *L. C.* and *H. L.* (the second son of *J. L.*) who claimed adversely to each other, the rents of the freehold estates under the limitations in the settlement in default of the appointment of them by *T.*

Held, by the Lords (partly affirming a decree made on that bill), 1st, that the plaintiffs were entitled to the rents of the copyhold estates under the residuary devise; 2ndly, (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between co-defendants.—*Sanford v. Morrice*, 11 Cl. & F. 667.

57. *Heir—Next of Kin—Option.*—Where money is directed by will to be vested in land, or other security, but the conversion has not in fact taken place until the whole interest, whether in land or money, has become vested absolutely in one person, any act of his indicating an option in which character to take or dispose of it will determine the succession as between his real and personal representatives.—*Cookson v. Cookson*, 12 Cl. & F. 121.

A testator gave his residuary estate to his wife, and appointed her his executrix to provide for his younger children. And as to his son *John*, he "would have 250 *l.* a year paid him until a sum of 10,000 *l.* can be invested in land, or some other securities, which is to be invested in trustees, for his use, as to the interest of such money or produce of such lands, for his natural life; and if he marries, &c.,

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that he may make such settlement on such wife, &c., as you judge proper, and that the remainder may go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son *Isaac* and his heirs for ever." The sum of 10,000 *l.* was vested in personal securities, and partly on mortgage of real estate; and on the death of *John* without any child, his widow being entitled to the interest for life, and *Isaac* entitled absolutely on her death, by their acts indicated their intention to take it as a money fund. *Isaac* survived the widow and died intestate:

Held, that even if the fund had been impressed by the will with the character of real estate, which was doubtful, it was reconverted into personalty by the subsequent acts of the parties entitled, and therefore the next of kin of *Isaac* (and not his heir), were entitled.—*Cookson v. Cookson*, 12 Cl. & F. 121.

58. *Annuities—Rule in Wild's Case.*—A will, disposing only of personalty, contained these words:—"My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be in any way entitled to, shall produce to my wife an annuity of 100 *l.* per annum, to each of my daughters 100 *l.* per annum, for themselves and their children, and to my wife's mother an addition to any property she may possess, so as to make up to her, during her life, an annuity of 100 *l.* per annum; said annuities, after the decease of my wife and her mother, to be equally divided among my three children, *William*, *Mary*, and *Julia Louisa*. All the rest and residue of my property and possessions I give and bequeath to my son *William*." At the time of the testator's death his daughters had no children:

Held, that the annuities thus created were perpetual annuities.—*Stokes v. Heron*, 12 Cl. & F. 161.

The testator's daughter, *M.*, died, and after her death he made a codicil to his will, dividing her annuity between his two surviving children,

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but in other respects confirming the will. His wife's mother having died, he made a second codicil, in these words: "And in case my son *William* shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife and my daughter, *J. L.*, my remaining property shall then be equally divided between two relatives named in the codicil, and their children":

Held, that these codicils did not alter the nature of the annuities given by the will to *Julia Louisa*.—*Stokes v. Heron*, 12 Cl. & F. 161.

Where a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted by a codicil to a life estate; unless the expressions there used are clear and undoubted.—*Id.*

Semble, that the rule in *Wild's* case (6 Rep. 17), that if *A.* devises his lands to *B.*, and to his children or issue, and he hath not any issue at the time of the devise, the same is an estate tail, is applicable to personalty.—*Id.*

59. *Machinery—Heir*.—In the absence of any disposition by the absolute owner of land of machinery erected by him upon and affixed to the freehold, it will go to the heir as part of the real estate.—*Fisher v. Dickson*, 12 Cl. & F. 312.

If the *corpus* of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir.—*Id.*

No distinction arises in the application of this rule, from the circumstance that the land did not descend to, but was purchased by the owner.—*Id.*

59. *Heir—Next of Kin—Remoteness*.—A testator being entitled to leasehold premises for terms of years, bequeathed them to trustees, in trust to permit his grandson, *B.*, to take the profits thereof during his life, and after his decease to permit such person who for the time being would take by descent, as heir male of the body of the said *B.*, his grandson, to take

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the profits thereof until some such person should attain the age of 21 years, and then to convey the same to such person so attaining that age, his executors, administrators, and assigns; but if no such person should live to attain the age of 21, then in trust to permit such person and persons successively, who, for the time being, would take by descent, as heirs male of the body of the testator's son (father of *B.*), to take the profits of the same leasehold premises until one of them should attain the age of 21, and then to convey the same to such heir male first attaining that age, his executors, administrators, and assigns. At the death of *B.* the grandson, his son and heir, *A.*, had attained the age of 21: he entered into possession of the leasehold premises. Upon a bill filed against him by the next of kin of the testator:

Held, that *A.* had not a good title to the leaseholds; that the bequest to the heir male of the grandson attaining 21 was void for remoteness; and, therefore, that the next of kin of the testator at his death became entitled to their distributive shares of the property on the death of the grandson.—*Dungannon (Viscount) v. Smith*, 12 Cl. & F. 546.

See *Williams v. Lewis*, 6 H. L. Cas. 1013; *Evers v. Challis*, 7 H. L. Cas. 542; *Christie v. Gosling*, L. R., 1 H. L. 284.

60. "*Surviving*."—A testator, after various bequests, gave to his wife for her life only, all his remaining estates and also gave her all his capital in trade, with three-quarters of the profits arising therefrom for her life; but nevertheless in trust, at her death, for his then surviving children, share and share alike, "independent of the rental of his said estates, which he gave and bequeathed to his 'surviving female children,' to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then

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their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow leaving children :

Held, that such children did not take any interest under the will, the word "surviving" having reference to the death of the testator's widow, and not to his own.—*Wordsworth v. Wood*, 1 H. L. Cas. 129.

61. "*Younger Son*."—In construing a will, the words "younger son," used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense.—*Wilbraham v. Scarisbrick*, 1 H. L. Cas. 167.
62. "*Tail Male*."—A testator devised freehold estates to trustees, in trust to settle and convey them to the use of *G. R.* for life, with remainder to his issue in tail male, in strict settlements; in default of such issue the estates to go over. *G. R.* had no son, but had several daughters all born after the testator's death :

Held, that the words in "tail male" were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take, under the limitation in remainder, as tenants in common.—*Trevor v. Trevor*, 1 H. L. Cas. 239.

63. *Legacies—Uncertainty*.—A testator gave to his executors beneficially, in equal proportions, all his property which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words: "In a codicil to my will, I gave to the Corporation of *Gloucester*, 140,000*l.* In this I wish my executors would give 60,000*l.* more to them for the same

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purpose as I have before named. I would also give my friends, &c." (several were named with large legacies), "and I confirm all other bequests, and give the rest of my property to the executors for their own interest." No other codicil was produced :

Held (affirming a decree of the Court of Chancery on a bill filed by the Corporation of *Gloucester*, claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of purpose.—*Corporation of Gloucester v. Osborn*, 1 H. L. Cas. 273.

See *Attorney General v. Dean of Windsor*, 8 H. L. Cas. 369.

64. *Accumulation—Remoteness—Debts and Legacies—Personal Estate*.—A testator after devising and bequeathing all his real and personal estates to trustees, on trust, from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate, and he declared that they should stand seised of his said trust estate and the accumulations upon trust, that when and as soon as any son of either of his nephews, *A.* and *B.*, should have attained the age of 25 years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons when and as they should respectively arrive at the age of 25 years, should choose one of such portions as the share to be allotted to him and his children, and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust, as to one equal moiety, for his eldest son, and his heirs, executors, &c., and as to the other moiety for the rest of his children, and their heirs, executors, &c., in equal proportions, and if but one child,

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both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of 25 years, or having attained that age, should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, *A.* and *B.* had several sons living, and *B.* had another son born afterwards:

Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews who should be living when the first of them should attain 25; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void; and the testator's real estates upon his death became vested in his heir:

Held, secondly, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it or to sell the real estate, so as to constitute a mixed fund.—*Boughton v. Boughton*, 1 H. L. Cas. 406.

65. *Meaning of Words of Description—Evidence.*—A testator, who described himself as of "*Ashford Hall*, in the county of *Salop*," devised "all my estate in *Shropshire* called *Ashford Hall*" to trustees for sale:

Held, that this description was not confined to the mansion house, properly so called, and the lands imme-

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diately adjoining, but extended to such other lands in *Shropshire* as he possessed at the time of making his will.—*Ricketts v. Turquand*, 1 H. L. Cas. 472.

Held, also, that the Court of Equity, in a suit to enforce the trusts of the will, might receive parol evidence to show what the testator had been accustomed to consider the *Ashford Hall* estate.—*Id.*

66. *Chattels—Grandson.*—A testator after devising real estates to trustees to the use of *J. D. P.* for life, remainder to his first and other sons in tail male, with like remainders to *J. D. P.* to receive the profits for his life; and from his decease to permit each of the several other persons to whom an estate for life in the real estates was before limited, as each of them should become seised of the said real estates under the aforesaid limitations, to receive the rents and profits thereof for his and their life and lives respectively; and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the said *J. D. P.*, upon trust, to assign and convey the chattels "to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid":

Held, that the chattels vested in an infant grandson of *J. D. P.*, who was tenant in tail of the real estates at *J. D. P.*'s death, and not in his eldest son, a prior tenant in tail, who died in *J. D. P.*'s lifetime.—*Potts v. Potts*, 1 H. L. Cas. 671.

67. *Meaning of Words—Context—Evidence.*—A testator devised his real estates in trust for "the second son of *Edward Weld*, of *Lulworth*," for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said *Edward Weld* and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said *Edward Weld* successively in tail male; with like remainders to

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the second and other sons (except the eldest), of Lady *Stourton*, "one of the sisters of the said *Edward Weld*." There was not, at the date of the will or death of the testator, any such person as *Edward Weld* of *Lulworth*; but it appeared from evidence received as to the state of the *Weld* family, that *Joseph Weld* was the then possessor of *Lulworth*, that he had an eldest brother living, and had an eldest son named *Edward Joseph* (commonly called *Edward*), and a second son named *Thomas*, both unmarried; and that he was himself the brother of Lady *Stourton*:

Held, that all the descriptions of the unnamed devisee, taken with the context of the will, and the evidence of the state of the *Weld* family, clearly designated *Thomas* the second son of *Joseph Weld*, and that he was entitled, as tenant for life, in possession, to the devised estates.—*Camoy's (Lord) v. Blundell*, 1 H. L. Cas. 778.

See *Drake v. Drake*, 8 H. L. Cas. 172.

68. College—Church—Education—Cy-pres.

—A testator, born in *Scotland*, and educated at *Glasgow* College, by his will, dated in 1677, when he was resident in *England*, where he died in 1679, gave the residue of his estate to trustees for the maintenance and education, at the University of *Oxford*, of scholars born and educated in *Scotland*, who should have spent a certain time as students at *Glasgow* College; and he declared it to be his will that every such scholar should, upon his admission at *Oxford*, execute a bond conditioned for payment of 500*l.* to the college if he should not enter into holy orders, and if he should accept any spiritual promotion, benefice, or other preferment in *England* or *Wales*, it being the testator's will that every such scholar should return to *Scotland*, there to be preferred and advanced as his capacity should deserve, but in no case to come back into *England*, nor to go into any other place, but only into *Scotland*, for his preferment. *Glasgow* College was Presbyterian, while the testator was a student there, but Episcopa-

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lian at the dates of his will, and of his death; soon after which Presbyterianism became by law the established form of Church government in *Scotland*, and has so continued, the Protestant Episcopal Church being always tolerated, and recently recognised by law, but not endowed. In 1693, a decree was made establishing this charity, and thereby it was declared that *Baliol* College should receive the testator's exhibitioners, according to the condition of his will; and directions were given as to the number of students, and their stipends, &c., but no scheme was directed. This decree was adopted by Lord *Hardwicke* in 1744, and a decree was then made directing a scheme for the administration of the charity *cy-pres*, it being impossible to carry the testator's intentions strictly into effect. The scheme was confirmed by a decree of Lord *Henley* in 1759, with certain variations as to increasing the number of exhibitioners and their stipends. Under these decrees, students had been admitted for many years at *Baliol* College from *Glasgow* College, without regard to their destination for holy orders, or their return to *Scotland*. Upon an information filed in 1845, at the relation of members of the Protestant Episcopal Church in *Scotland*, a decree was made, directing the Master to inquire whether the scheme sanctioned by the former decrees, and according to which the charity had been administered, could be varied, so as to make it more effectually conducive to the supply of the present Protestant Episcopal Church in *Scotland* with competent clergymen, being natives of *Scotland*, and educated at *Glasgow* and *Oxford*; and in making such inquiry the Master was to have regard to the said will, and to the circumstance that at its date the Established Church of *Scotland* was Episcopal, and is now Presbyterian:

Held, that the proposed inquiry contemplated a new scheme, inconsistent with that under which the charity had been administered for more than a century, as near to the testator's intentions as was practicable;

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and that the proposed alteration of it was not warranted by any alteration in the state of the law and church in Scotland.—*Officers of Glasgow College v. The Attorney General*, 1 H. L. Cas. 800.

69. *Third Parts—Election*.—*R. P.*, being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened), over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. *R. P.*, becoming entitled to a moiety of another third share of the same estates, settled to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. *R. P.*, by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death, to raise a sum of 500*L*.; and as to the residue of the said one-third part, and the remaining two-third parts, she gave the same to her husband for life, remainder to her infant son and his heirs; but in case he should die under 21, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will; the annuity to be payable upon the son's death, and the legacies, as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under 21 without issue:

Held, that the appointment of the "one-third part" for payment of the annuity and legacies extended only to one-ninth of *R. P.*'s original third share, and to one-third of the moiety of the other third share; that the annuity and legacies became payable at the death of the son, with interest on the legacies from that time; that the will did not affect the husband's rights under the settlement, and no case of elec-

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tion was raised against him.—*Sauceard v. M'Donnell*, 2 H. L. Cas. 88.

70. *Eldest Surviving Son—Residue*.—A testatrix gave to the eldest son of her daughter *Eliza*, and of her husband *E. L.*, who should be living at the time of her decease, ten guineas, adding that she left him no larger sum because he would have a handsome provision from the estate of her late husband, and of his own father (who was still alive). And she gave the residue of her property to her executors upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter *Eliza*, who were then in being or should be thereafter born, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of 21 years. At the death of the testatrix, her daughter *Eliza* had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died without issue, before the youngest child attained 21. The second, who then became an eldest son, did not succeed to the provisions which had been made for an eldest son:

Held, notwithstanding, that he, being the eldest son at the time the youngest of the children attained 21, was excluded from any share in the moiety of the residue.—*Livesey v. Livesey*, 2 H. L. Cas. 419.

71. *Estate Tail—Implied Remainder*.—A devise of lands in trust for *J. B.*, a reputed son, for his life, and, after his decease, for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common; and, in default of issue of the said *J. B.*, to and for the testator's heirs:

Held, that *J. B.* took only an estate for life, and that no remainder in tail could be implied after the limitation to the daughters.—*Baker v. Tucker*, 3 H. L. Cas. 106.

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72. *Trustees—Discretion—Annuity.*—A testator, after making certain specific bequests, proceeded as follows:—"I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects as, at the time of my decease, shall produce the clear annual income of 1500*l.*; and I direct that the same shall be selected and appropriated and set apart, as soon as may be, &c., by my said trustees, in their uncontrolled discretion, upon trust to pay" to his wife the dividends during her life or widowhood, and after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered at their discretion to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and re-invest, as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the Court should direct. The Court refused to exercise the discretion vested in the trustees; but, acting on its general rule in such matters, as the testator had not expressed a different intention, directed the annuity to be raised by the purchase of an adequate sum in Consols, and ordered the Master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object:

Held, that the decree thus made was correct.—*Prendergast v. Prendergast*, 3 H. L. Cas. 195.

73. *Executor—Residue.*—A testator devised "all my estate, both real and personal, to *E. E.*, his executors, administrators, and assigns, to and for the several uses, intents, and purposes following, that is to say;" and then, after specifying various objects of his bounty, appointed "the said

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E. E. executor of this my last will and testament." The trusts of the will did not exhaust the estate:

Held, affirming a decree of Lord Chancellor *Cottenham*, that *E. E.* did not become entitled to the residuary personal estate for his own benefit, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. (*Dawson v. Clark*, 18 Ves. 247, affirmed.)—*Ellcock v. Mapp*, 3 H. L. Cas. 492.

The rule in such case is, that where there appears a "plain implication or strong presumption," that the testator by naming an executor meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus.—*Id.*

74. *Conversion of Estate.*—A testator made a will in the following form: "Whereas I am seized in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c., and of a leasehold estate in &c., and also of a copyhold estate, situate, &c., and also of freehold estates in &c., and of large sums in the funds of England; now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid, which I order to be paid out of my personal estate, all my estates in the funds of England and all my said manors, &c., unto three persons in succession, and their sons successively in tail male, in strict settlement, "and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c., and to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, and premises, devised by this my will as shall be then existing undetermined, or capable of taking effect, &c., to &c., for no other

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estate, use, trust, or purpose whatsoever."

Held, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that, on the face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another.—*De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

75. Condition Subsequent—Public Policy.—

The Earl of Bridgewater, by his will, devised very large real estates to trustees, to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for and during the term of 99 years, if he shall so long live;" remainder to trustees during his life to preserve contingent remainders; remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. H. C. for the term of 99 years, if he shall so long live;" remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared, "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford, or C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the

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said Lord Alford and C. H. C. respectively." The testator then provided that every person entitled under his will, or the settlement thereby to be made, should take and use the surname and arms of Egerton only, and should "apply for and use his utmost endeavour to obtain his Majesty's license to sanction the same," and that every person thus entitled neglecting so to do, the estate limited to such person should thereupon cease, determine, and be void. The testator likewise provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heir males of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, in which case the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died, without acquiring either of the titles, leaving an heir male:

Held, that the estate thus created in favour of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, and which was void, as being against public policy, and therefore that the eldest son of Lord Alford was entitled to the estates as heir male under the limitation.—*Egerton v. Brownlow (Earl)*, 4 H. L. Cas. 1.

76. Contingency—Living at her Death.—

M. D. devised certain estates to his nephew, Sir J. E., Bart., for life, and after his decease, to his second son and his heirs male, and in default, &c., to the third son and his heirs male, and so on, with a proviso that if the baronetcy should come to or descend to the second

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son of Sir *J. E.*, the estate should go over to the next in succession. *P. J.*, the father of Lady *E.*, by a will made subsequently to that of *M. D.*, devised his estates to his daughter, Lady *E.* for life, then to her eldest son for life, and his heirs, &c., and for default, &c., to the second son of Lady *E.* for life, and to his heirs ("in case he shall not become or shall not continue seised of the real estates of *M. D.* by virtue of his will"), and to the third and every other son of Lady *E.*, subject to the like conditions. "Provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid, then and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs, &c.," with cross remainders among them; "and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." At the time of the death of Lady *E.* there were two sons and several daughters living; both sons afterwards died without issue:

Held, that the daughters of Lady *E.* did not take any estate under the limitations of the will of *P. J.*, for that the words, "living at her death," applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother.—*Eden v. Wilson*, 4 H. L. Cas. 257.

See *Collemann v. Collemann*, L. R., 3 H. L. 121.

77. *Additional Legacies—Presumption—Substitution.*—A testator gave by his will "To my natural or reputed daughter, *M. S.*, 2000 *l.*, for her own sole and separate use, the interest thereof, at 5 per cent, to be expended on her education," and entrusted the care and charge of her to his brother. In a codicil, executed five

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years afterwards, he said, "I add 3000 *l.* to the 2000 *l.* to which *M. S.* is entitled under my will, by which she becomes entitled to 5000 *l.*" In about a year afterwards, and about 10 days before his death, he made a farther codicil, in which he said "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000 *l.* for my daughter *M. D.*;" in this instance giving her his own name, as if she was a legitimate daughter:

Held, affirming the decree of the Court below, that there were circumstances here to rebut the *prima facie* presumption in favour of 'the last legacy being treated as additional, and that it was only substituted for the sums previously given.—*Russell v. Dickson*, 4 H. L. Cas. 293.

78. *Enlarging Estate.*—Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate.—*East v. Twyford*, 4 H. L. Cas. 517.

79. *Estate for Life or Tail—Executors—Trust—"Interest"—"Son"—"Grandson."*—A testator, by a will written on the pages of a small note book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words, "The eldest and other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was, with the will, admitted to probate. *K.* was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after *K.*;" and if not, "the property aforesaid, set down and particularised in No. 1, to go to *M.*, if not to *L.*, and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to *N.* and *O.* The card

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showed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the trustees of the will were to invest in the purchase of real estate; and in page 54, *L.* was named as the person to take No. 1 after the life estate of *K.* A grandson was "to inherit before the next named in the entail, or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, *O.* was, as to that, to succeed to *K.*, and the estate there given to *O.* was expressly a life estate, with remainder to his eldest and other sons in tail male; and it was there also said, "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in *Suffolk*; the "succession" there was (page 54) "first to *K.*, then to *M.*," and the devise (page 47), was "first to *K.*, and then to *M.*, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of *K.*, I repeat, I bequeath all the property aforesaid to *M.* and his heirs male, in the manner aforesaid, as in the case of *L.*, &c., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions."

Held, that taking all the parts of the will together, *L.* only took a life estate in No. 1, with remainder to his eldest and other sons in tail male. *East v. Twyford*, 4 H. L. Cas. 517.

Held also, that this was not an executory trust.—*Id.*

80. *Mistakes of Name.—Residue.*—A testatrix who, without professional assistance, made her own will, named *Robert John M.* (the eldest son of her brother) her executor. She then created two annuities, of 50*l.* each, in favour of two persons, and made a gift to a third, but in terms which left it doubtful whether the gift was of that specific sum, or of an annuity to that amount: she then proceeded thus: "My dear nephew,

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John Henry M. of H., surgeon, but late of *Calcott Hall*, the above bequests to fall into his hands, and should he not marry, to be divided equally between *Samuel M.*, *John M.*, and *Mary D.*" (formerly *Mary Margaret M.*, but then a married woman), "all of them late of *Calcott Hall*, must each receive 50*l.*, the residue to fall into my above-named executor's hands." There was a son, *Thomas*, born between *Samuel* and *Mary*, but there was no son named only *John*; the second nephew, *John Henry*, died unmarried; the others survived him:

Held, affirming a decision of the Master of the Rolls, and Lord Justice *Turner* (Lord Justice *Knight Bruce* having dissented), that *Thomas* was not entitled to any share of the residue.—*Mostyn v. Mostyn*, 5 H. L. Cas. 155.

81. *Annuities—Charge on Real Estate.—*

Copyholds.—Interest on Debts.—A testator was in 1792 possessed of freehold lands, and of an equitable fee in a copyhold estate. He made a will, by which he subjected the whole of his real estate in aid of his personalty to the payment of his debts, and, subject thereto, he gave all his "messuages, tenements, lands, hereditaments, and premises, with the buildings, mines, &c.," thereon and therein, over which he had a disposing power, to trustees, for 500 years, out of the rents, &c., or by assignment, &c., of the term, to raise money to pay his debts and legacies, and, after payment thereof, to apply the rents, &c., or the remainder of the estate, to the use of his grandson, *C. W. C.*, on his attaining 23, and to raise 1000*l.* to pay to his other grandson, *R. C.*, on his attaining 23. And in order that these two grandsons might be properly educated, the testator directed that the sum of 200*l.*, until *C. W. C.* should attain 23, and 100*l.* afterwards, and till *R. C.* should attain 23, should be annually raised for that purpose. By the custom of the manor the copyholds which the testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. The testator had not made any surrender of them to the use of the

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will. When he died, in 1799, his only daughter (the mother of *C. W. C.* and *R. C.*) was his customary heir, and on her death they became her customary heirs :

Held, that the testator's copyhold interest did not pass by the will, but descended to his customary heir.—*Torre v. Browne*, 5 H. L. Cas. 555.

The annuities created for the maintenance of the grandsons had fallen into arrear :

Held, that they were charged on the real estate itself, and not merely on the annual rents and profits.—*Id.*

Held also, that the annuities did not carry interest.—*Id.*

The suit to administer the will was instituted in 1800; a great many delays had taken place; it is a rule of Equity to give interest where there has been unnecessary and vexatious delay; but as the House could not attribute the delays in this case to any particular party in the suit, no interest was allowed.—*Id.*

82. "*Nearest of Kin of the Male Line*"—"Capital Property."—A testator directed that a certain portion of his property should be invested, and the dividends, &c., paid among his brothers and sisters and their children; that the residue should accumulate for 21 years after his death, at the end of which time the accumulated fund (to which the testator gave the name of his "capital property") was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The "inheritor" of this capital property was to assume the testator's surname, "if not of that surname," and was to "bear and use the arms, with the differences, which may have been at any time previous to my death assigned to me." The testator, in a memorandum, dated some time afterwards (and which was admitted to proof as a codicil), directed that his gold medal given for the capture of *Java*, should descend with "the patent of my armorial bearings to the inheritor of my capital property." The Crown, in consideration of the distinguished

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services of the testator, had, between the date of the will and of the codicil, made a grant of arms to the testator "and his descendants," and failing them, then (with the omission of emblazoning the *Java* medal) "to be borne by the descendants of his late father, with due and proper differences." At the date of the will and at the death of the testator he had two brothers and several sisters living. The two brothers (unmarried), the unmarried sisters, and two of the married sisters died within the 21 years, leaving one married sister and the sons and daughters of her married sisters and of herself surviving. *B.*, the son of a paternal uncle of the testator, claimed the "capital property" of the testator as being the only person who answered the description of "the nearest of kin in the male line" :

Held, that he was not entitled, the words of the will not restricting the gift to a male claiming through males.—*Sayer v. Bradley*, 5 H. L. Cas. 873.

The married sister was held entitled to the "capital property."—*Id.*

83. *Charge of Debts—Devisee of Real Estate.*—Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title.—*Colyer v. Finch*, 5 H. L. Cas. 905.
84. *Heir—Devisee.*—A bill to establish a will against an heir-at-law may be mentioned at the suit of a mere legal devisee of real estate not charged with any duty or trust under the will.—*Colclough v. Boyse*, 6 H. L. Cas. 1.
85. *Undue Influence.*—Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a

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will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose.—*Boyse v. Rossborough*, 6 H. L. Cas. 2.

In order to set aside the will of a person of sound mind, it must be shown that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shown to have been exercised, and exercised in relation to the will itself, and not merely to other transactions.—*Id.*

86. *Construction—Equitable Remainder—Contingencies*—"Die under 21 and without Issue".—A testator who was possessed of two estates, *S.* and *H.*, devised them to trustees, to pay debts, legacies, and annuities "and subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson *Robert W.* and the heirs of his body; but in case he shall die under the age of 21 years, and without issue, my estate at *H.* (subject to the trusts hereinbefore respectively declared), shall be in trust for my granddaughter *Ann W.* and the heirs of her body; but in case she shall die under the age of 21 years, and without issue, the last mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my estate at *S.* And I declare and direct, that if my said grandson *Robert W.* shall die under the age of 21 and without issue," the trustees were to stand seized of *S.* on trust, to pay the rents and profits to the use of the testator's son *Richard W.*, and his wife, for life, "and subject to the trusts hereinbefore thereof declared, the estates at *S.* shall be in trust for" the family of *D.* in fee. The trustees were to raise during the minority of *Robert* and *Ann* money for their maintenance. The grandson *Robert W.* attained 21, but died without issue; the granddaughter *Ann W.* also attained 21, but died without issue:

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Held, (Lord *St. Leonards* dissentiente), first, the words must be read in their ordinary sense as written. The first limitation over depended on the double event of *Robert* dying under 21, and without issue, which not having happened, the limitation over did not take effect, but the estates descended to *Richard*, the son and heir-at-law of the testator, and through him to *Robert*, as his heir-at-law.—*Grey v. Pearson*, 6 H. L. Cas. 61.

Secondly. On *Robert* attaining 21, the equitable remainder in fee of the *S.* estate, limited to the *D.* family, took effect in possession; but the ultimate limitation to that family only operated on the *S.*, but not on the *H.* estate.—*Id.*

Per Lord *St. Leonards*: First, the testator did not intend to die intestate as to either of his estates. A change might be made in the words of the will to give effect to his real intention. The first gift was in tail; the limitation over depended on *Robert* dying without issue, and was perfectly good as a remainder.—*Id.*

The remainder in fee to the *D.* family, did not depend on the previous contingencies taking effect; but was an ultimate devise of all the testator's remaining interest in the estates, so as wholly to exclude his heir-at-law.—*Id.*

87. *Mortmain*.—*B.* devised to *S.* a piece of land in *N.*; *B.* then declared his desire to erect and endow almshouses in *N.*, and he empowered his trustees "so soon as land in *N.* shall have been legally dedicated to charitable uses" by some other person, within 12 months after his decease, to pay to the trustees of the intended charity a sum of 60,000 *l.*, to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for the same:

Held, reversing the decision of the Master of the Rolls, that this bequest was not void under the Mortmain Act.—*Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

As there was no question of construction occasioned by the obscurity of the will itself, the costs were ordered

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to come out of the fund bequeathed.
—*Philpott v. St. George's Hospital*,
6 H. L. Cas. 338.

88. "Surviving"—"Other"—"Such Issue."
—Where there is, in a will, a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other."—*Smith v. Osborne*, 6 H. L. Cas. 375.

O., in anticipation of marriage, executed a settlement, which recited that "whereas *O.* is entitled to a contingent remainder on failure of the issue of *G. C.*, party hereto, in the town and lands of *S.*, and in certain tenements in *W.*, subject only to such powers over the same as shall appear to be vested in *G. C.* under and by virtue of the last will of *T. C.*," and it went on to covenant, that when and so soon as "the said remainder" should become vested in *O.* in possession, he would then convey the property to the uses of the settlement. By the will of *T. C.*, both these properties were devised to *G. C.* for life, remainder to his first and other sons in tail, remainder to the testator's daughters, *Elizabeth* and *Frances*, as tenants in common in tail, and if either daughter should die without issue, then "to the use of my surviving daughter and the heirs of her body lawfully issuing, and in default of such issue, to my own right heirs." *G. C.* died unmarried, and the lands of *S.* and *W.* descended to the two daughters (one of whom was *O.*'s mother) as tenants in common. The two sisters executed disentailing deeds as to *S.*, but not as to *W.*, and soon afterwards *O.*'s mother died intestate, and her property descended to *O.*, her son, the covenantor. The other sister by will gave all her property to *O.*, her nephew, subject to certain annuities and legacies:

Held, that as to the lands at *S.*, the entail of which had been barred, and which had not descended to *O.* under the will of *T. C.*, this covenant did not take effect; but it did take effect as to the lands at *W.*, for the word "surviving" in the will of

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T. C. must be construed to mean "other," and the words "such issue" included the issue of both daughters, and therefore *O.* succeeded to both moieties of that estate as tenant in tail under the will.—*Smith v. Osborne*, 6 H. L. Cas. 375.

89. *Charge—Deficiency.*—A testator directed his brother *A. B.* (whom he appointed his executor and trustee) to get in his estate and to stand possessed of the produce thereof, in trust, to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when invested, the dividends should "realise the clear annual income or sum of 200*l.*," and to pay to "my wife such dividends, interest, or annual income," &c., for her life or widowhood. On her death or second marriage, *A. B.* was to stand possessed "of the said principal or trust money, and the stocks upon which the same shall be invested," in trust for himself and the other brothers and sisters of the testator. And as to the residue, "after raising thereout the money sufficient to realise the annuity for my said wife," *A. B.* was to stand possessed thereof on similar trusts; provided that if the testator should die leaving children, the trusts for his brothers and sisters were to be null, and the children were to take the whole. The estate when got in and invested did not produce 200*l.* a year:

Held (reversing the decision of the Court below), that the widow was not entitled to have the deficiency made good out of the corpus of the estate.—*Baker v. Baker*, 6 H. L. Cas. 616.

90. *Estate Tail—"Issue"—"Heirs of the Body."*—Devise (in 1817) of a freehold estate for lives renewable for ever, "to my son *W.* during his life, and after his death to his lawful issue, in such manner, shares, and proportions as he, by deed or will, shall appoint, and for want of such appointment, then to his issue equally, if more than one; and, if only one child, to said child; and on failure of issue of *W.*," to *J.* Another estate, consisting of fee simple lands, was devised in the same terms to

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another son, *J.*; and on failure of the issue of *J.*, it was to go to *W.* *J.* and *W.*, before the birth of any child to *W.* (*J.* himself never married), joined in a recovery as to the lands devised to *J.*, and to which *W.* afterwards succeeded in possession on *J.*'s death without issue. *W.* died, leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:

Held, that under these devises each of the first devisees took an estate tail by implication.—*Roddy v. Fitzgerald*, 6 H. L. Cas. 823.

Where, in a devise, there is a gift over on general failure of "issue," it is presumed that the word "issue," has been used by the testator, as meaning "heirs of the body."—*Id.*

When the word "issue" is so employed, it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning.—*Id.*

The remainders here were contingent, and therefore the recovery suffered as to the fee-simple lands operated as a bar to them whether the first devisee did or did not take an estate tail.—*Id.*

91. *Annuities and Legacies, from what Fund Payable.*—A testatrix devised all her real and personal estate to *A.* and *B.*, to get in and sell the same on trust, to pay debts, and then to discharge the following legacies, naming two: "I also give and bequeath to *T.* 2000*l.* (in which sum, or thereabouts, he now stands indebted to me) subject to, and I charge the same with, the payment of the following life annuities and sums of money; (that is to say)"—She then gave to her sister 40*l.*, to her sister's husband, *W. L.*, if he survived his wife, 20*l.*, and to her sister, *M. P.*, 20*l.*, which annuities were to be paid, when they became due, by *T.*; the first payments to the two sisters at the end of six months after the death of the testatrix; and to *W. L.* at the end of

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six months after the death of his wife. The testatrix then gave four legacies of 50*l.* each to nephews and nieces; 40*l.* to the only child of a nephew, and 50*l.* between the two children of a deceased nephew, and directed these legacies to be paid within 12 months after the death of her sister, *M. P.*, and to be paid by *T.* Then followed a proviso, that she did not intend the legacy of 2000*l.* to *T.* to exonerate him from the debt due to herself, but whatever should be due at her decease was to be taken in part or in satisfaction (as the case might be) of the legacy; and then came a general direction that "the several and respective legacies hereinbefore bequeathed" should be paid to the respective legatees within 12 calendar months after her decease, or so soon afterwards as her real and personal estates could be collected and converted into money. There was also a direction that the legacies payable to the children of the nephews should be vested interests in them at 21, and in the meantime the money should be invested by the trustees for the benefit of the children. *T.* never paid any part of the debt, and became utterly insolvent:

Held (Lord *Wensleydale diss.*), affirming the decree of the Court below, that the annuities and legacies charged on that debt were intended to be payable, if the particular fund (the debt) failed, out of the general assets.—*Vickers v. Pound*, 6 H. L. Cas. 885.

92. *Estate Tail—Remoteness—Accumulation.*—A testator gave certain leaseholds to trustees for a term of 30 years, to receive rents and profits, and pay debts and legacies, to accumulate the rents, &c.; to permit his son *Benjamin* to take the rents for his own use "until the son of my son *Benjamin* (if he shall have a son) shall attain 21; and then I give and bequeath the premises to trustees, to preserve contingent remainders, but to permit such son to receive the rents and profits for his natural life, and after his decease to the heirs male of such son and the heirs male of their bodies; and for default of such issue, I give the pre-

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mises to the trustees to permit my son *Lewis*," and then followed the same provisions with respect to *Lewis* as those which had been previously made with respect to *Benjamin*, and in default, &c., the premises were again given to trustees to preserve remainders, and then came a repetition of the former provisions in favour of "the son of my daughter *Abigail*." *Benjamin* and *Lewis* successively entered into possession of the leaseholds, and died without male issue; *Abigail* had a son, who attained 21:

Held, that the devise over after *Benjamin* was not void for remoteness, but that *Abigail*'s son took an estate tail, the rule as to freeholds being in this case properly applicable to leasehold estates.—*Williams v. Lewis*, 6 H. L. Cas. 1013.

Held, also, that the direction to accumulate in respect of the term of 30 years was not void, for the legacies payable by the will were only legacies given to persons then in being.—*Id.*

93. "*Right Heirs*"—*Estate Tail*.—Devise "to the right heirs of my grandfather *S.*, deceased, by *M.*, his second wife, also deceased, for ever":

Held, that the first words created an estate tail, which was not enlarged into an estate in fee by the use of the words "for ever." — *Vernon v. Wright*, 7 H. L. Cas. 35.

94. *Annuity — Principal of the Fund*.—A testator gave an annuity of 2000*l.* to his widow, and set apart, out of his personal property, a sum sufficient to provide for its payment. He then directed that, on the death of his widow, the sum so set apart should "become the property of my son *George*, so far as he shall receive the interest during his life, and on his death the principal sum to become the property of any children he may leave, in such sums as he shall direct, but in the event of my son dying before his mother, then the principal sum to be divided among the children of my daughters, the deceased *Jane R.* and *Mary P.*, and of my now surviving daughter, *Elizabeth M.* (should she leave any

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issue) in equal portions." *George* married after the date of the will, had one son, and died before the testator:

Held, affirming the decree of the Master of the Rolls, that on the death of the testator's widow, the son of *George* became entitled to the fund which had been set apart to provide the annuity, for that the property in it vested in the children of *George* independently of their father, who merely took a life-interest in it.—*Ricketts v. Carpenter*; *Abbott v. Middleton*, 7 H. L. Cas. 68.

95. *Execution of Will*.—A will must be executed according to the law of the country where the testator was domiciled at the time of his death.—*Whicker v. Hume*, 7 H. L. Cas. 124.

But see now, 24 & 25 Vict. c. 114.

The grant of probate not appealed against, conclusively established that it was so executed.—*Id.*

96. *Legacies—Specifically devised Estates*.—A testator residing in *Ireland*, who was possessed of real and personal property, made his will in June 1836, by which he devised certain freehold estates to trustees for a term of 99 years, to pay an annuity to his wife, and another annuity to one of his sons for life; the estate after the death of his son to go to the sons of that son in tail male. He gave other lands, some freehold, some leasehold, to other sons. He created annuities, and gave legacies, directed the different properties devised and bequeathed to fall, in certain events, into his residuary estate, and at the end of his will directed that, "in case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and incumber the same with the payment thereof." In a codicil he said, "I charge and incumber all my estates of every description, both real and personal, with the following legacies:" and he gave to these legatees a power to distrain on any part of his estates or property of every description for the arrears of the

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interest due on the annuities given by the codicil :

Held, affirming a decree of the Lord Chancellor of Ireland, that the legacies were not charges on the specifically devised estates.—*Conron v. Conron*, 7 H. L. Cas. 168.

97. "*The Funds*"—*Bank Stock*.—A testatrix possessed property in Consols, Reduced Annuities, and in Bank Stock; she made her own will, and she left to her brother "Everything I may be possessed of at my decease, for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the funds to E. S.":

Held, affirming the judgment of the Court below, that the Bank Stock did not pass to E. S. upon the brother dying a bachelor. *Dub. Lord Chelmsford* and Lord Kingsdown.—*Slingsby v. Grainger*, 7 H. L. Cas. 273.

98. "*Eldest Male Lineal Descendant*"—*Directions for Investing*—*Uncertainty*.—A testator who had three sons, A., B., and C., directed an accumulation of his property for a certain period, at the end of which the trustees were to divide it into three lots, one of which was to be conveyed to "the eldest male lineal descendant then living of A." When the time for making the allotment arrived, there were two persons who claimed to be entitled to the first lot, a grandson of A.'s eldest son, and a son of A.'s youngest son; the former being "eldest" in line, the latter "eldest" in years among the male descendants of A.:

Held, that the will was not void for uncertainty, and:

Held also, that on the true construction of the words used by the testator, the grandson of A.'s eldest son was entitled to the first lot.—*Thellusson v. Rendlesham*, 7 H. L. Cas. 429.

The will directed the trustees to receive the rents and profits of the testator's lands, and from time to time to cut timber and sell it, and to lay out the rents and profits and the price of the timber in the purchase of other lands, the rents and profits

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of which, and the price of the timber cut from which, were to be laid out in the same manner; but there was no direction as to the manner in which the rents and profits of the last-mentioned lands were to be disposed of:

Held, that this omission (there being a general direction at the end of the will to lay out the money of the testator, however arising, in the funds, and to sell and re-purchase as the trustees might think fit, until a sufficient sum could be accumulated to make a proper purchase of land, and a convenient purchase should present itself) did not leave any part of the fund undisposed of, so as to establish a title to it in the next of kin.—*Thellusson v. Rendlesham* 7 H. L. Cas. 429.

Held (Lord St. Leonards diss.), that the question of uncertainty had not been disposed of in any previous question upon this the *Thellusson* will.—*Id.*

99. *Gift over*—*Executory Devise*—*Contingent Remainder*—*Remoteness*.—Though a gift over may in one alternative operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder.—*Evers v. Challis*, 7 H. L. Cas. 531.

The invalidity of one alternative will not necessarily defeat the other.—*Id.*

Devise to E. for life, "and from and after her decease to such child or children as she may have, if a son or sons who shall live to attain the age of 23, and, if a daughter or daughters, who shall live to attain the age of 21, as tenants in common, &c.," and in case of the death of any son under 23, or daughter under 21, the share to go to the survivors attaining those ages. And in case E. has only one son to attain 23, or a daughter to attain 21, to such son or daughter. "And also, in case E.'s children shall die under" the ages mentioned, "or if she has none, then to J., A., and S. for life, and afterwards to their sons and daughters on attaining the above ages respectively." There were similar devises to J., A., and S., but in the

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devises to *J.* and *S.* nothing was said as to total absence of issue; in that to *A.* the words used were "and farther, in case *A.* shall die without issue." *E.* first, and *A.* afterwards, died without ever having had a child:

Held, that on the death of *A.* the gift over in favour of a daughter of *J.*, who had attained 21, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of *A.*) determined, the contingency on which the remainder was to take effect, had occurred.—*Evers v. Challis*, 7 H. L. Cas. 531.

Held also, that though the gift over, on the death of sons under 23, was void for remoteness, the gift over on death without having had issue, was not thereby affected.—*Id.*

A. died without ever having had issue:

Held, that though in the devise to her the not having had issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain 23 or 21, and therefore on her death without ever having had issue, the gift over took effect.—*Id.*

Fearn's Comment on Gulliver v. Wickett (Ex. Dev. 396) remarked on.—*Id.*

100. *Charge "and Interest."*—Where the will of the tenant for life disposes of a charge "and interest," those words cannot be taken to refer to anything but the interest which will accrue after his death, till the charge itself is redeemed.—*Kensington* (Lord) *v. Bouverie*, 7 H. L. Cas. 557.

101. *Legacies, Charge on Realty*—"Part of my Property."—If there are general gifts of legacies, and then of the rest and residue, real and personal, blending the whole in one mass, though accompanied by a power to the legatee of the residue, "to dispose of the same in any manner he may think proper," the legacies are a charge on the realty (*dub.* Lord *Wensleydale*).—*Greville v. Broune*, 7 H. L. Cas. 689.

A testator gave a legacy, which, if not received, was to form "part of the residue of my property." Then

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followed a legacy to *A. B.*; but if the legatee should die before time for payment, it was to be considered "as part of the residue of my property, and to go and merge in the same." After some small legacies, his will concluded, "All the rest, residue, and remainder of any property I may die possessed of, whether estates, freeholds, &c. &c., bonds, bills, &c., annuities, &c., I devise and bequeath to my son, in the fullest manner I can, with liberty to him to dispose of the same in any manner he may think proper." The son was named as one of the executors, but did not act as such. The will was proved by the other executor. The son mortgaged the real estates:

Held, that the legacy to *A. B.* was a charge on the real estates, and on a sale of them in the Encumbered Estates Court, took precedence over the mortgages, notwithstanding the general power to the devisee to dispose of the estates in any manner he thought proper.—*Greville v. Broune*, 7 H. L. Cas. 689.

102. *Limitation—Vested Estate—Condition—Contingent Devise.*—There is no foundation for the doctrine, that if there be a limitation in a will, which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise.—*Clavering v. Ellison*, 7 H. L. Cas. 707.

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.—*Id.*

G. C. gave his real and personal estates to trustees, upon trust (among other things) to invest his personal estate, and pay the interest to his son *T. J. C.*, for life, then to all the children of his son, and their heirs; and he gave all the residue amongst all the children, to be paid as they should attain 21; "provided that the devisees hereinbefore contained to the children of my said son are made upon this express condition, that they be educated in *England*, and in the Pro-

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testant religion, according to the rites of the Church of *England*; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of *England*, then I do hereby revoke," &c., and there was a gift over:

Held, that the children took equitable estates tail, subject to be divested upon certain contingencies; that the proviso constituted a condition subsequent to defeat vested estates, and was therefore to be construed strictly.—*Clavering v. Ellison*, 7 H. L. Cas. 707.

The children went with their father to *France* when about eight years of age, and remained with him there from 1802 to 1810, during which time he was detained as a prisoner of war by *Napoleon*, but they might have returned to *England* had their father so pleased. They were, during their continuance in *France*, educated at Roman Catholic schools, but were not proved to have been taught Roman Catholic doctrines, but were able to receive religious instruction from a Protestant minister who attended each of their schools. On their return to *England*, at the peace of 1814, they were sent to *English* Protestant schools:

Held, that under these circumstances they had not incurred the forfeiture within the words of the proviso.—*Id.*

103. Codicil—Effect on Will—"Farther".

—Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil.—*Hopwood v. Hopwood*, 7 H. L. Cas. 728.

A father made his will, giving to each of his three younger children 5000*l.* On the marriage of one of them, a daughter, he paid to the husband 2000*l.* By a codicil he declared that sum to be in part satisfaction of the 5000*l.* One of his younger sons, *F.*, married. On that marriage, the father entered into a covenant that he would cause to be paid

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to the trustees of the marriage, within 12 months after his death, the sum of 5000*l.*, with interest in the meantime, at the rate of five per cent., such interest to be employed in the payment of premiums on life policies. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, and directed his trustees to raise "a farther sum of 7000*l.*" for each of them, and to hold such farther sum on the same trusts as those of the 5000*l.* The testator afterwards raised a sum of 5000*l.*, with which he purchased a lieutenant-colonelcy in the Guards for his other younger son, *H.*, and he then made a codicil, declaring that this sum, so laid out, was to be taken by *H.* in satisfaction of the legacy given him by the will:

Held, that these circumstances did not show an intention on the part of the testator rebutting the presumption that the 5000*l.* given by the will to *F.* were adeemed by the settlement.—*Hopwood v. Hopwood*, 7 H. L. Cas. 728.

Meaning of the word "farther."—*Id.*

104. Attestation.—To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose.—*Hindmarsh v. Charlton*, 8 H. L. Cas. 160.

The signature or acknowledgment of the testator must be made in the presence of two witnesses present at the time, and they must, after he has so signed, or so acknowledged his signature, subscribe the will in his presence.—*Id.*

A testator produced his will to *A.*, and signed it in *A.*'s presence. *A.*, whose name consisted of four words, the first of which began with "*F.*" then, in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "*T.*" He afterwards advised the testator that there

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ought to be two witnesses to the will, and in the afternoon of the same day, *B.* being present, the testator produced his will, and showed and acknowledged his signature in the presence of both *A.* and *B.* *B.* then wrote his name, and at his desire *A.* added the date, and then observed and corrected the first initial of his own name by crossing the *T.*, and so making it *F.*:

Held, affirming the judgment of the Probate Court, that the will was not duly attested within the 1 Vict. c. 26, s. 9.—*Hindmarsh v. Charlton*, 8 H. L. Cas. 160.

105. *Mistake in Name of Devisee*.—A testator devised a life interest in an estate to his "sister *Mary Frances T. D.*" He had no sister, but he had a sister-in-law of that name. After making other devises and bequests, he gave the residue equally among four persons, one of whom was thus named and described: "My niece *Mary Frances T. D.*" He had no niece who bore those two names conjointly; he had nieces who bore one or other of those names:

Held, affirming the judgment of the Court below, that the bequest as to one-fourth part was void for uncertainty.—*Drake v. Drake*, 8 H. L. Cas. 172.

106. "*Die in my Lifetime*."—Two persons, husband and wife, made their separate wills. In the husband's will the property was given to the wife; "and in case my wife shall die in my lifetime," then to *W. W.* in trust for the children on their coming of age; and in case all of them should die under age, then to *W. W.* for his absolute use and benefit. In the wife's will (made under a power given to her in her father's will) the property was given first to the husband, then, as in the other will, to the children; "and in case my husband should die in my lifetime," to *W. W.* absolutely. The husband and wife and their children perished at sea, being all swept off the deck by one wave, and all disappearing together:

Held (Lord Campbell, Lord Chancellor, *diss.*), that on the true construction of the wills it was necessary for

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W. W. to show affirmatively that one or other had survived, and that in the absence of such proof the property went to relatives specifically named in the will of the wife's father, as if there had been no will by the husband, nor any appointment by the wife.—*Wing v. Angrave*, 8 H. L. Cas. 183.

Held, likewise (Lord Campbell, *diss.*), that the union of the characters, of legatee under the husband's will, and appointee under the wife's, did not place *W. W.* in a situation of greater advantage than if the two characters had been held by different persons.—*Id.*

107. *Construction*.—*Will before or after 1837*—*Attestation*.—In applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded.—*Randfield v. Randfield*, 8 H. L. Cas. 225.

Where a testator made a will in 1837 (before the Wills Act), but did not execute it till 1844, and in the meantime one contingency mentioned in the will had gone, the words in the will were construed with reference to that contingency.—*Id.*

A testator devised all his freehold and copyhold estates to his son "when he have obtained the age of 21 years, upon the following conditions," and directed that his widow should receive an annuity out of the rents. He then gave to his son all his personal estates, consisting of ships, bonds and funded stock, &c., "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates, as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned "(they paying all my son's debts, funeral expenses and demands, or my wife's, should she be the longest liver)."

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The son became 21 some years before the will was executed; he married, but died without ever having had issue:

Held, varying the decree of the Court below, that the gift over affected only the real estate.—*Randfield v. Randfield*, 8 H. L. Cas. 225.

Held also, that the will must be read, as if made in 1844. That the contingency of attaining 21 was to be disregarded, and that the gift over took effect on the son dying without issue.—*Id.*

A will was executed in 1844. It had the name of the testator, his seal, the word "witness," and then the names of two persons, *J. T. G.* and *J. S. H.* These names were the last marks on the third side of the sheet of paper on which the will was written. On the top of the fourth side were the words, "This last will and testament was signed in our presence, and in the presence of each other, by him, *J. T. G.* and *J. S. H., G. B.*" This last name was that of a person named as a legatee in the will:

Held, that this was not such an attestation of the will as to deprive *G. B.* of her right to the legacy.—*Id.*

108. *The Sovereign's Will.*—The will of the Sovereign has no effect in conveying the demesne lands of the Crown.—*The Attorney General v. The Dean and Canons of Windsor*, 8 H. L. Cas. 369.

109. *General and Particular Intent.*—Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which, words of a technical kind are not necessarily to receive a technical meaning.—*Jenkins v. Hughes*, 8 H. L. Cas. 571.

A. had several great nephews: *T., W., J.,* and *J. G.* His will was drawn up by himself while abroad. It contained the following passages: "I name and appoint my universal heir my great nephew *T.*, eldest son of my nephew *W.*, to whom I give all my lands, &c." "The eldest son of my godson and great nephew *T.*, who may be living at his father's death is always to be considered as heir to, my estates." "If my godson and

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great nephew *T.* should not leave any son at his death, I direct that his next brother and second son of my nephew succeed to my estate, and so on, in case of failure of male heirs to the third, fourth, &c." "The eldest great nephew living always to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line:"

Held, upon the true construction of the whole will, that the general intent was that the great nephew *T.* should take an estate in tail male, and that that intent must prevail.—*Jenkins v. Hughes*, 8 H. L. Cas. 571.

110. *Power—Revocation.*—If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of the power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power on such revocation, being in full force, there may be a valid execution of it by will, as well as by deed.—*Saunders v. Evans*, 8 H. L. Cas. 721.

111. "*Then*"—*Shares—Joint Tenancy—Family Arrangement.*—*Statutes of Limitations and Distributions.*—*A. D.*, after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity of 600 *l.* for life, and the residue to his son's children, and, in case there should not be any child of the son, "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the Statutes of Distributions of Intestates' Effects have become, and been then entitled thereto, in case I had died intestate." At *A. D.*'s death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without ever having had a child:

Held, that the word *then*, even if treated as an adverb of time, referred only to the time when the

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persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that, on the death of the son without issue, the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four.—*Bullock v. Downes*, 9 H. L. Cas. 1.

Held also (*dub.* Lord *Wensleydale*), that these shares were not taken in joint tenancy, for where there is a bequest to persons who would have been entitled under the Statutes of Distributions, they take as if there had been an intestacy.—*Id.*

During the life of the son, and till the time of filing the bill, which was 24 years after his death, all the members of the family had believed, and had done many acts on the belief (not the result of legal discussion, but a mere family assumption) that the son was not entitled to a share of the residue as one of the next of kin, but that his title to the property expired with his life estate:

Held, that this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim.—*Id.*

Held also, that the length of time was not a bar under the Statute of Limitations, for that the will created a trust.—*Id.*

Semble, the 40th section of 3 & 4 Will. 4, c. 27, applies to legacies charged on land.—*Id.*

112. *Autograph Will*.—In construing the autograph will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out.—*Hall v. Warren*, 9 H. L. Cas. 420.

A testator gave all his real and personal estate to his executors: then mentioned a specific house, 71,

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Queen's-road, Bayswater, which he gave to the inhabitants of *B.*, to found a charity, directed the executors to call a meeting of the inhabitants to appoint trustees to carry his scheme into execution, named his godson, *W. H. W.*, to be one of the trustees, leaving to the inhabitants to choose as many more as they pleased; and then said, in the event of the inhabitants not being willing to carry out the scheme, "I will that all my said property so given to said charity shall absolutely belong to my said godson, *W. H. W.*" He afterwards made some pecuniary gifts, and devised leasehold and freehold houses for life to different persons; each house on the death of the devisee being given to the "residuary legatee or legatees" for the charity. As to one freehold house alone, 4, *Douglas-place*, there was a gift of it to *W. H. W.* for life, then to the trustees of the charity; but should there be no charity established, then to *W. H. W.* absolutely. The gifts to the charity being contrary to the Statute of Mortmain, no meeting of inhabitants was called, nor were any trustees appointed:

Held (*dub.* Lord *Wensleydale*), affirming the decree of Vice-Chancellor *Wood*, that on the general failure of the gift to the charity, the gift over took effect; and therefore, in the case of the house, No. 4, *Douglas-place*, *W. H. W.* became entitled to it absolutely.—*Hall v. Warren*, 9 H. L. Cas. 420.

But held also, so far reversing the decree of the Court below, that *W. H. W.* was only entitled, in addition, to the house, 71, *Queen's-road, Bayswater*, for that the words "all my said property so given" must be restricted to that house and did not affect the general property of the testator, as to which he must be treated as having died intestate.—*Id.*

The Attorney-General v. Hodgson, 15 Sim. 146; *Philpott v. St. George's Hospital*, 21 Beav. 134; 6 H. L. Cas. 338 ante No. 87.—*Id.*

113. *Foreign Will—Consols—Intestacy*.—*A.*, a British subject, domiciled at *St. Petersburg*, made a will in the Russian form and Russian language,

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by which he expressed a desire "to dispose of all my moveable and immoveable property." After giving legacies, and directing his household property and estates in *Russia* to be sold, he went on, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets" [a bank debenture peculiar to *Russia*], "belonging to me, shall be divided into 10 equal parts;" two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed disposal;" but if he did not, and he never did, they were to go to charitable purposes. He then named executors, and concluded thus, "And as all my moveable and immoveable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions and contest the same, and no one has a right to interfere with or control the dispositions and proceedings of my executors." The testator had large funds in the *English* consols:

Held, that the executors did not take these consols under the general bequest in the will:

And held also, that as to these consols there was an intestacy.—*Enohin v. Wyllie*, 10 H. L. Cas. 1.

114. "Survivor."—The benefit of survivorship may be given to those who have life interest as tenants in common.—*Taafe v. Conmee*, 10 H. L. Cas. 64.

The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation.—*Id.*

When the word "survivor" is applied to a class of persons, and individuals of that class are named, its natural meaning is "the longest liver" of those who are named.—*Id.*

- A. devised his estates in trust to the use of his nephew, *D. F.*, and his issue male in strict settlement, "and for default of such issue male in *D. F.*, to the use of my nieces *Julia*,

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Rose, and *Bridget*, and the survivor of them for the term of their natural lives, as tenants in common and not as joint tenants, without impeachment of waste, and from and after their decease to the use of their first and every other son and sons, and the heirs male of their respective bodies, successively, in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred, &c., and for default of such issue male, then to the daughters of the said *Julia*, *Rose*, and *Bridget*; and for default of such issue, male or female, to my own right heirs." He directed that no son of a niece should take any benefit under the will unless on assuming his name. *D. F.* died without issue. *Julia* had a daughter; *Rose* and *Bridget* had, each, a son. *Julia* and *Rose* died:

Held, that the nieces took as tenants in common for life, with cross remainders between them for life; that on the deaths of *Julia* and *Rose*, the "survivor," *Bridget*, took the whole for life; that the sons took a remainder, expectant on her death, as tenants in common in tail male, and that there was no estate in any daughter of a niece, until a total failure of issue male.—*Taafe v. Conmee*, 10 H. L. Cas. 64.

115. "Children"—Holograph Will—"Heirlooms."—When there is a devise of land to "*A. B.* and his children," and at the time of the devise he has no child, the word "children" is *primâ facie* a word of limitation, and the first taker shall have an estate tail; if he has children, it is *primâ facie* a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator to be collected from the whole of the will.—*Byng v. Byng*, 10 H. L. Cas. 171.

A testatrix, in a holograph will, gave "in trust to my executors for my niece, *M. A. B.*, and her children, all my *Quendon Hall* estates in *Essex*, provided she takes the name of *Cranmer* and arms, and her children, with

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my mansion house, furniture, plate books, linen, &c., Archbishop *Cranmer's* portrait, by *Holbein*, *India* cabinet, striking watch, and my diamond earrings as *heirlooms* with my estate." The niece died before the testatrix, leaving several children :

Held, affirming the decree of the Court below, that "children" was a word of flexible meaning, and that on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property.—*Byng v. Byng*, 10 H. L. Cas. 171.

Semble, that "heirlooms" must mean something which, though not in its own nature heritable, is to have a heritable character impressed upon it.—*Id.*

(*Wild's case*, 6 Co. Rep. 17, and *Buffar v. Bradford*, 2 Atk. 220, explained.)—*Id.*

116. *Rule of Construction—Power to Defeat the Will—Heir.*—It is not a good rule in construing a will to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will.—*Atkinson v. Holtby*, 10 H. L. Cas. 313.

A testator devised particular estates to the use of his daughter *E.*, for life, remainder to her children, remainder to *John*, the elder son of another daughter *F.*, for life ; then to *John's* children ; then to *George*, second son of *F.*, for life ; then to *George's* children ; remainder to *A. F.*, *F.* and *E.*, the other children (daughters) of his daughter *F.*, in equal shares ; remainder to trustees to preserve, and remainder in equal shares to the children of his four grand-daughters, and the heirs of their bodies, such children taking their mother's share as tenants in common in tail ; remainder to the survivor of such children ; in default of issue of grand-daughters, over. He devised his residuary estates, in the same manner, to his daughter *F.*, and then to *John* and *George*, as before, and then, "in default of such issue, to *A. F.*, *F.*

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and *E.* for their lives, in equal shares ; remainder to trustees to preserve the contingent remainders hereinafter limited ; remainder in four equal shares to the children of my grand-daughters, and the heirs of his, her, or their body, such children taking their mother's share as tenants in common in tail, remainder to the survivors or survivor, and the issue of their bodies in tail ; in default of issue of my grand-daughters," over :

Held, reversing a decision of the Lords Justices, and affirming that of the Master of the Rolls, that the grand-daughters, and not their children, took estates tail with cross-remainders between them, and that, consequently, all the grand-daughters but one having died without issue, and that one having left a son and a daughter, the son was entitled to an estate in fee-simple in seven-eighths parts of the estate, and the daughter to the remaining eighth part.—*Atkinson v. Holtby* 10 H. L. Cas. 313.

A question on the construction of a will of realty was raised in a partition suit between two persons claiming under a devise ; the heir at law did not appear in the Court below, nor in this House :

In pronouncing the decision, it was declared in this House that that decision must be considered as pronounced without prejudice to any rights which the heir at law might claim to possess.—*Id.*

117. *Costs—Residue—Interest on Money Due.*—*A.*, the younger of two sisters (the only children of their father), was about to be married. By a pre-nuptial contract executed abroad, where the marriage was to be celebrated, and the parties to it were domiciled, the father agreed to give *A.* a dowry of 40,000*l.* ; of these, 20,000*l.* were to be paid within six months after the marriage ; the remaining 20,000*l.*, divided into two sums of 10,000*l.* each, were made payable, one on a given event, the other on the father's death, with power reserved to him to pay the last-mentioned sum during his life. In the contract he declared his in-

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tention to give to A. an equal portion with her sister of what he should leave as residue, and used words which appeared to leave it doubtful whether this portion was to be ascertained before or after payment of debts and legacies. By his will he gave legacies to an amount which, with the debts, entirely exhausted what would otherwise have been residue. The final sum of 10,000*l.* was not paid in his lifetime. After his death, A. filed a bill against his representatives, to obtain payment of this sum, and also payment of the share of the residue, calculated on its gross amount before payment of debts and legacies. The Court below held that on the proper construction of the contract this latter claim was unfounded; and, as to this claim, dismissed the bill with costs, but ordered payment of the 10,000*l.*, with interest to be calculated from the period of six months after the father's death:

Held, that the order dismissing the Bill with costs was right, for that the claim was founded on a misinterpretation made by the plaintiff of the contract, and was not the consequence of any act of the testator, such as ought to make the costs come out of the estate.—*Di Sora v. Phillpps*, 10 H. L. Cas. 624.

But the decree was varied so far as related to the interest on the 10,000*l.*, which was ordered to be calculated from the date of the father's death.—*Id.*

118. *Conversion of Estate—Residue—Intermediate Income.*—Where, for the purpose of a disposition in a will, real estate is directed to be converted into money, or money to be converted into real estate, and the disposition fails, though the conversion has actually taken place, the real estate, or the money, will retain its original character for the purpose of ascertaining the ownership of it.—*Bective v. Hodgson*, 10 H. L. Cas. 656.

The rules which are applicable to the gift of a residue are applicable to the parts into which that residue may be divided.—*Id.*

T., by his will, devised his real estates to trustees, on trust, one of which

WILL—continued.

was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, and gave the same to his trustees (who were also his executors) on trust to invest two-third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estates; the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being:

Held, that the intermediate income of these two-thirds was not undisposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will, so far at least as not to exceed the period allowed by law for accumulation.—*Bective v. Hodgson*, 10 H. L. Cas. 656.

Hopkins v. Hopkins, Cas. temp. Talb. 45-51, explained and corrected.

119. *Manor.*—A devise of a "manor" will not carry lands which had been part of the demesne lands of the manor, but had been severed from it, and were re-purchased by the testator between the date of his will and his death.—*Delacherois v. Delacherois*, 11 H. L. Cas. 62.

120. *Implication.*—Implication may arise from an elliptical form of expression, which necessarily involves and implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else.—*Parker v. Tootal*, 11 H. L. Cas. 143.

Where, therefore, a will gave to T. an "estate for life, with remainder to the first son of the body of T. lawfully begotten, severally and successively in tail male," the words "and other sons" were introduced in order to prevent the words "severally, &c." from being in effect struck out of the will, and T. was held to take an estate tail by implication.—*Id.*

WILL—continued.

Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator.—*Parker v. Tootal*, 11 H. L. Cas. 143.

Where, therefore, there was a gift (after the happening of certain events) amongst "my daughters and their children," the child of a daughter who had died before the date of the will was held not to be entitled to a share of the property.—*Id.*

A testator named *Chorlton* had two sons, *Richard* and *James*. *Richard* had a son, *Thomas*, and died. Some years afterwards *James* married; and just before the birth of *James's* son the testator made his will, and died about two months after the birth of this son. By his will the testator devised "unto my grandson *Thomas Chorlton*, son of the late *Richard Chorlton*, all that, &c. for his own use during his natural life, with remainder to the first son of the body of the said *Thomas Chorlton* lawfully begotten, severally and successively in tail male of the name of *Chorlton*; and for want of such lawful issue of that name, either by my said grandson *Thomas Chorlton* or my said son *James Chorlton*, then I give, &c., amongst my daughters and their children," &c. The grandson *Thomas* entered, and while in possession suffered a recovery; he survived both his uncle *James* and *James's* son:

Held, that taking all the words of the gift together, there was, by implication, an estate tail in the grandson *Thomas*, and that the recovery barred all right of ultimate succession in the daughters.—*Id.*

121. *Power—Residue*.—A testator, after making specific devises of his property, real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c., not hereinbefore specifically bequeathed, I give, &c., to my executors, their heirs, &c., upon the trusts following," to pay debts and legacies, to permit his nephew, *H. B. C.*, to receive the rents for life, and "after the death of my said ne-

WILL—continued.

pew, provided he shall leave any child or children him surviving, &c., I direct that my executors shall stand seised of my said residuary estate, upon trust for such persons and for such ends and purposes as my said nephew shall, by his last will, direct, appoint, or devise, but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not, previous to his decease, make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c., upon trust for *B.*, *Y.*, and *R.*, their heirs, &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and, declaring himself thereby entitled to appoint, he appointed the residue to *E.* and *J.*:

Held, affirming the decision of the Master of the Rolls, that the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid, and the residuary estate went, under the uncle's will, to *B.*, *Y.*, and *R.*—*Earle v. Barker*, 11 H. L. Cas. 280.

122. "Issue"—*Shifting Clause—Acceleration of Remainder*.—A. so devised his estate of *G.* that no female issue of any son of *B.*, his first devisee, could take or inherit. *B.* being himself possessed of another estate, *C. H.*, and having succeeded to the *G.* estate, made a will by which he devised his original estate *C. H.* to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that "as often as such estate of A. should come to the possession of any of his (*B.'s*) sons or daughters, or any of their issue, that then the person

WILL—continued.

next in remainder under the limitations in his (*B.*'s) will, should be entitled to the *C. H.* estate: and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the *G.* estate had died, or was then dead, without issue."

Held, that "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluded them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.—*Jellicoe v. Gardiner*, 11 H. L. Cas. 323.

123. *Estate for Life—Remainder—Remoteness.*—A testator devised all his manors, &c. "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve"—(this devise in trust was repeated whenever necessary)—"for the son or sons, daughter or daughters, the males taking first, of my said son till they attain the age of 21 years, or the days of their marriage, and no farther; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part or even the whole of these estates" to any or either of his sons, but not to the daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200 *l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being

WILL—continued.

equally divided between them or their heirs;" and he gave the "estates and property to them through the said trustees," &c., whom he empowered to raise 10,000 *l.* for the daughters, chargeable on all his estate:

Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that, on the son's death without issue, the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness.—*Watkins v. Frederick*, 11 H. L. Cas. 358.

Quere, whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate?—*Id.*

124. *General Devise—Enumeration of Particulars.*—Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise.—*West v. Lawday*, 11 H. L. Cas. 375.

A person was possessed under one and the same lease for lives, renewable for ever, of lands denominated *B.*, *C.*, *F.*, and *G.*, all situated in the county of *Kerry*. He granted out the lands of *G.* for lives with a covenant, for perpetual renewal, reserving thereout a perpetual fee farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of *Kerry*, "which said lands are denominated *B.*, *C.*, and *F.*, all situated in the parish of, &c., in the county of *Kerry*." He directed that "the aforesaid lands" should be sold, and "after payment of my just debts, be equally divided between *J. W.* and *S. L.*" After giving several legacies, he made *J. W.*

WILL—*continued.*

"residuary legatee of all my real and personal estate and effects :

Held, reversing the decision of the Master of the Rolls and the Lord Justices of Appeal in *Ireland*, that the estate of *G.* did not pass under the general devise, but went to the residuary legatee.—*West v. Lawday*, 11 H. L. Cas. 375.

WINDING-UP ACTS.

1. The mere fact of a person being a member of the provisional committee of a joint stock company, does not make him liable as a "contributory" within the Winding-up Acts.—*Norris v. Cottle*, 2 H. L. Cas. 647.

C. consented to have his name inserted in the list of provisional committee-men of a proposed railway company, which was provisionally registered; and the name was accordingly inserted and advertised; he did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned :

Held, that *C.* incurred no liability to contribute towards payment of the debts of the company, and was not a "contributory" within the Winding-up Acts.—*Id.*

2. If a person whose name is on the provisional committee of a joint stock company, provisionally registered, "accepts" shares in the company, although he does not pay the deposits, he is a contributory within the Winding-up Acts. *U.*'s name was on the list of the provisional committee contained in a published prospectus of a railway company provisionally registered, and in answer to a letter from the secretary informing him that the committee of management had apportioned 100 shares in the company to each provisional committee-man, and desiring to be informed whether he would take them, he wrote a letter saying, "I accept the 100 shares allotted me." The secretary afterwards sent him a letter of allotment, "not transferable," stating that the committee of management had allotted to him 100 shares, and re-

WINDING-UP ACTS—*continued.*

questing him to pay the deposits thereon into one of the company's banks on or before a certain day, "or the allotment would be null and void." *U.* paid no deposits, and did no other act in connection with the company. The undertaking having failed for want of capital, was abandoned :

Held, that the first two letters formed a complete contract, exclusive of the third, and that *U.* was a contributory within the Winding-up Acts, 1848 and 1849.—*Hutton v. Upfill*, 2 H. L. Cas. 674.

3. The 7 & 8 Vict. c. 110, does not create any new liability in an allottee of shares, beyond what his own contract imports.—*Hutton v. Thompson*, 3 H. L. Cas. 161; *Norris v. Cooper*, *Id.*

A. wrote a letter of application for shares in a railway company which was provisionally registered, and received answer in the usual form, declaring that certain shares had been allotted to him, on which he was required to pay a deposit. *A.* paid the required deposit, but neither signed the subscribers' agreement nor the Parliamentary contract. The scheme was abandoned :

Held, that *A.* did not, by his letter of application for shares and by paying the deposits thereon, become a "member" of the company, or a "contributory" within the meaning of the Joint Stock Companies Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever in fact be established :

Held, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list.—*Id.*

4. A projected railway company, provisionally registered, is within the meaning of the Winding-up Acts which may therefore be applied to it if a Court of Equity shall so think fit.—*Bright v. Hutton*, 3 H. L. Cas. 341.

The liability of a person as a contri-

WINDING-UP ACTS—continued.

butory under the Winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law.—*Bright v. Hutton*, 3 H. L. Cas. 341.

Contributories are those only who have contracted, by themselves or agents, with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account.—*Id.*

A. was a member of the provisional committee of a projected railway company, which had been previously registered, and the affairs of which were put under the authority of a managing committee. He accepted shares, and paid a deposit on them; but did no farther act. The scheme was abandoned:

Held, that on these facts he was not liable to a creditor for business done under the orders of the managing committee towards completing the project and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts.—*Id.*

5. The intention of the 11 & 12 Vict. c. 45 (the Winding-up Act of 1848), was to provide for debts recoverable only in equity, as well as for those recoverable at law; and the Master has a discretion (subject to appeal) to allow or disallow, or to allow as a claim only, according to the proofs adduced before him, any demand against a company.—*Terrell v. Hutton*, 4 H. L. Cas. 1091.

Certain persons proposed to form a company; they employed A. as their solicitor before the formation of the company, and until it was wound up; the directors were not to be personally liable to the officers of the company. The 44th article of the deed of settlement declared, that "a sufficient part of the funds of the company should, upon complete registration, be appropriated in payment of the expenses of, and incidental to, the formation of the company, including those of or having reference to the preparation and execution of that deed." When the company was before the Master on

WINDING-UP ACTS—continued.

the Winding-up Act, the solicitor presented a demand for services from the earliest period up to that time. The Master allowed the demand as a claim only, and not as a debt, leaving the solicitor to proceed at law:

Held, reversing an order of Vice Chancellor *Kindersley*, that the Master ought to have allowed this demand as a debt, but subject to proof that the items came under the description contained in the 44th article, and subject also to taxation.—*Terrell v. Hutton*, 4 H. L. Cas. 1091.

6. A disallowance by the Master of a claim made under the Winding-up Acts the subject of an appeal.—*Ernest v. Nicholls*, 6 H. L. Cas. 401.

7. Ordinarily speaking, it is not under the provisions of the 25 & 26 Vict. c. 89, s. 199, a discretionary matter with the Court, when a debt, due by a registered company, has been established and remains unsatisfied, to refuse to the creditor an order for winding up the company.—*Bowes v. Hope Insurance Company*, 11 H. L. Cas. 389.

But (per Lord *Cranworth*) it is possible that a case might occur in which the Court could refuse such an order.—*Id.*

H., an insurance company, registered under the "Joint Stock Company's Act, 1844," granted a policy on a life. H. transferred its business and its liabilities to another company, M. The life fell; an action was brought against the H. company. Several pleas were pleaded; a director and agent of the M. company entered into a negotiation with the plaintiff, and got the policy transferred to himself; the pleas were then withdrawn, and judgment entered against the H. company. The director then assigned the policy and judgment to B. as trustee for another person; execution was issued, and a return of *nulla bona* made. B. then presented a petition for a winding-up order against the H. company. The Master of the Rolls granted the order. The Lords Justices offered to B. the opportunity of going into evidence in support of his claim, which was impeached by the H.

WINDING-UP ACTS—*continued*.

company as collusive; but he declined to do so, insisting that the company could not impeach it except by filing a bill to stay or set aside the judgment. On this refusal the Lords Justices discharged the order of the Master of the Rolls:

Held, that the order of the Master of the Rolls could not be sustained, the *H. Company* being entitled to file a bill to impeach the judgment. But the petitioner was not bound, as a preliminary to his right to the order, to go into farther evidence in support of his claim, for, there being a judgment in his favour, the burden of impeaching it lay on the company. The order of the Lords Justices was therefore reversed, and the petition was ordered to stand over until a fixed day, on the respondents undertaking to file a bill to impeach the judgment.—*Bowes v. Hope Insurance Company*, 11 H. L. Cas. 389.

See *Williams v. Harding*, L. R., 1 H. L., 9.

WINDOWS. See LIGHTS.

WITNESS. See EVIDENCE.

1. A Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of *Rome*, and therefore admissible as a witness to prove that law.—*Sussex Peerage Case*, 11 Cl. & F. 85.

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between a deceased peer and his alleged wife are not receivable in evidence, upon a claim of peerage, as the declarations of a deceased party made against his own interest, such interest not being of a pecuniary nature.—*Id.*

The law does not recognise the apprehension of possible danger of a prosecution, as creating an interest which can bring these declarations within the rule in favour of their admissibility in evidence upon the ground of there being declarations made against the interest of the party making them.—*Id.*

WITNESS—*continued*.

2. The 56 *Geo. 3*, c. 87, is repealed by the 1 & 2 *Vict. c. 37*; and this latter Act applies to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions in *Ireland*.—*O'Connell v. The Queen*, 11 Cl. & F. 156.

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- “Accessory.”—*Divorce*, 90.
- “Advancement and propagation of education.”—*Charity*, 44.
- “All and every other.”—*Will*, 354.
- “All my estate in called.”—*Will*, 367.
- “And.”—*Will*, 375.
- “Beneficial enjoyment.”—*Succession Duty*, 315.
- “But.”—*Will*, 379.
- “Capital Property.”—*Will*, 374.
- “Carburet of Manganese.”—*Patent*, 211.
- “Chattels” to go as directed, “so far as the rules of Law and Equity will permit.”—*Will*, 355.
- “Child.”—*Will*, 385.
- “Conniving.”—*Divorce*, 90.
- “Court of Civil Judicature,” applies to Committee for Privileges.—*Practice*, 272.
- “Deprived.”—*Succession Duty*, 314.
- “Die in my Lifetime.”—*Will*, 382.
- “During the Marriage.”—*Adultery*, 4.
- “Education in England and in the Protestant Religion.”—*Will*, 380, 381.
- “Eldest male lineal descendant.”—*Will*, 379.
- “Eldest Son.”—*Will*, 354.
- “Estate and Effects.”—*Probate*, 284.
- “Every Person and Persons.”—*Charity*, 43, 44.
- “Existing Interests.”—*Office*, 203.
- “Exportation.”—*See the Heading*.
- “Farther.”—*Will*, 381.
- “First male heir.”—*Will*, 360.
- “Forthwith.”—*Condition*, 54.
- “Free.”—*Manse*, 78.
- “The Funds.”—*Will*, 379.
- “Godly learning.”—*Dissenters*, 88.
- “God’s Law.”—*Marriage*, 183.
- “Grassum.”—*Entail*, 96.
- “Heir.”—*Will*, 383.
- “Interest.”—*Will*, 380.
- “Intersected Lands.”—“*Headings of Clauses*.”
- “Intimidation.”—*See this heading*.
- “Issue male.”—*Marriage Sett.*, 188.

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- "Literature."—*Dissenters*, 88.
- "Male line."—*Will*, 383.
- "Members."—*Entail*, 95.
- "Members."—*Entail*, 2.
- "Mountain."—*Evidence*, 114.
- "Municipal Corporation."—*Trust*, 332.
- "My Estate of."—*Will*, 349.
- "Nearest of the male line."—*Will*, 374.
- "Other."—*Will*, 376.
- "Overplus."—*Charity*, 44.
- "Part of the residue of my property."—*Will*, 380.
- "Party to the Proceedings."—*Auction*, 24.
- "Payable."—*Marriage Settlement*, 189; —*Settlement*, 305.
- "Person."—*Charity*, 43; *Trust*, 332.
- "Pertinents."—*Common*, 49.
- "Port."—*Insurance*, 145.
- "Prevailing."—*River*, 298.
- "Properties."—*Will*, 348.
- "Protestant Dissenters."—*Evidence*, 110.
- "The Railway."—*Railway*, 289.
- "Reducing a thing into Possession."—*Game*, 128.

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- "Register of Proprietors." and "Register of Shareholders."—*Evidence*, 110.
- "Res Suo perit in Domino."—*Landlord and Tenant*, 164.
- "Right heirs" "for ever."—*Will*, 378.
- "Septennial Fines."—*Tenantry Act*, 154.
- "Shealings."—*Boundaries*, 37.
- "Such."—*Headings of Clauses*.
- "Sufficient."—*Manse*, 178.
- "Surviving."—*Will*, 365.
- "Surviving" "other" "such issue."—*Will*, 376.
- "Survivor." "other."—*Deed*, 81.
- "Tail male."—*Will*, 366.
- "Then."—*Will*, 381.
- "Things."—*Will*, 346.
- "Timber."—*Will*, 355.
- "Trustees of Inheritance."—*Will*, 347.
- "Unmarried."—*Settlement*, 305.
- "Village."—*Evidence*, 114.
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- "Waiver."—*Practice*, 263. *Railway*, 286.
- "Without lawful issue."—*Will*, 355.
- "Younger Son."—*Will*, 366.

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- 25 *Edw.* 3, s. 5, c. 2. Treason, 326.
- 1 *Hen.* 4, c. 13. Weighmaster, 346.
- 4 *Hen.* 4, c. 20. Weighmaster, 346.
- 10 *Hen.* 7, c. 22. Treason, 326. Weighmaster, 346.
- 22 *Hen.* 8, c. 15. Highway, 133.
- 26 *Hen.* 8, c. 13. Peerage, 221.
- 27 *Hen.* 8. Tithes, 321.
- 28 *Hen.* 8, c. 3 (*Ir.*). Peerage, 216.
 - c. 7. Marriage, 183.
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- 32 *Hen.* 8, c. 34. Assignment, 17.
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- 37 *Hen.* 8, c. 12. Tithes, 319, 320, and 323.
- 13 *Eliz.* c. 5. Mortgage, 193.
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- 31 *Eliz.* c. 5. Prescription, 277. Usury, 340.
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- 1 *Jac.* 1, c. 11, s. 3. Divorce, 89.
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- 13 *Car.* 2, stat. 2, c. 1, s. 12. Corporation, 64.
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- 3 *Will. & M.*, c. 2. Oath, 201.
- 7 & 8 *Will.* 3, c. 3. Treason, 326.
- 9 *Will.* 3, c. 11, s. 8. Pleading, 226.
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- 2 *Anna.* c. 6 (*Ir.*). Conformity, 54.
- 4 *Anna.* c. 14 (*Ir.*). Oath, 201. Weighmaster, 346.
- 6 *Anna.* c. 2 (*Ir.*). Registration, 293.
- 7 *Anna.* c. 21. Treason, 326.
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- 10 *Anna.* c. 12. Church and Church-rate, 47. Presbytery, 277.
- 11 *Anna.* c. 2. Mortgage, 195.
- 11 *Anna.* (*Ir.*), c. 3. Lease for Lives, 167.
- 12 *Anna.* c. 2, s. 16. Prescription, 277.
- 12 *Anna.* sess. 2, c. 16. Usury, 340.

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- 6 *Geo. 1*, c. 18. Insurance, 145.
- 8 *Geo. 1*, c. 4, s. 2. Pleading, 230.
- 11 *Geo. 1*, c. 18. Corporation, 65.
- 9 *Geo. 2*, c. 5 (*Ir.*). Assignment, 17.
- 9 *Geo. 2*, c. 36. Mortmain, 198. New South Wales, 200.
- 11 *Geo. 2*, c. 19. Reversion, 297.
- 12 *Geo. 2*, c. 11. Royal Marriage, 299.
- 14 *Geo. 2*, c. 20. Fine and Recovery, 120.
- 16 *Geo. 2*, c. 11 (*Sc.*). Evidence, 101. Pleading, 226.
- 22 *Geo. 2*, c. 33. Marriage, 183.
- 25 *Geo. 2*, c. 13 (*Ir.*). Reversion, 297.
- 26 *Geo. 2*, c. 33. Marriage, 183.
- 33 *Geo. 2*, c. 14 (*Ir.*). Practice, 271. Pleading, 236.
- 7 *Geo. 3*, c. 27. Corporation, 64.
- 11 & 12 *Geo. 3*, c. 10 (*Ir.*). Mortgage, 197. Receiver, 292.
- 12 *Geo. 3*, c. 11. Marriage, 182. c. 72. Bills and Notes, 29. Jurisdiction, 161. Libel, 172.
- 17 *Geo. 3*, c. 50. Auction, 23.
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- 20 *Geo. 3*, c. 54. Custom, 78.
- 23 *Geo. 3*, c. 18. Bills and Notes, 29. Jurisdiction, 161. Libel, 172.
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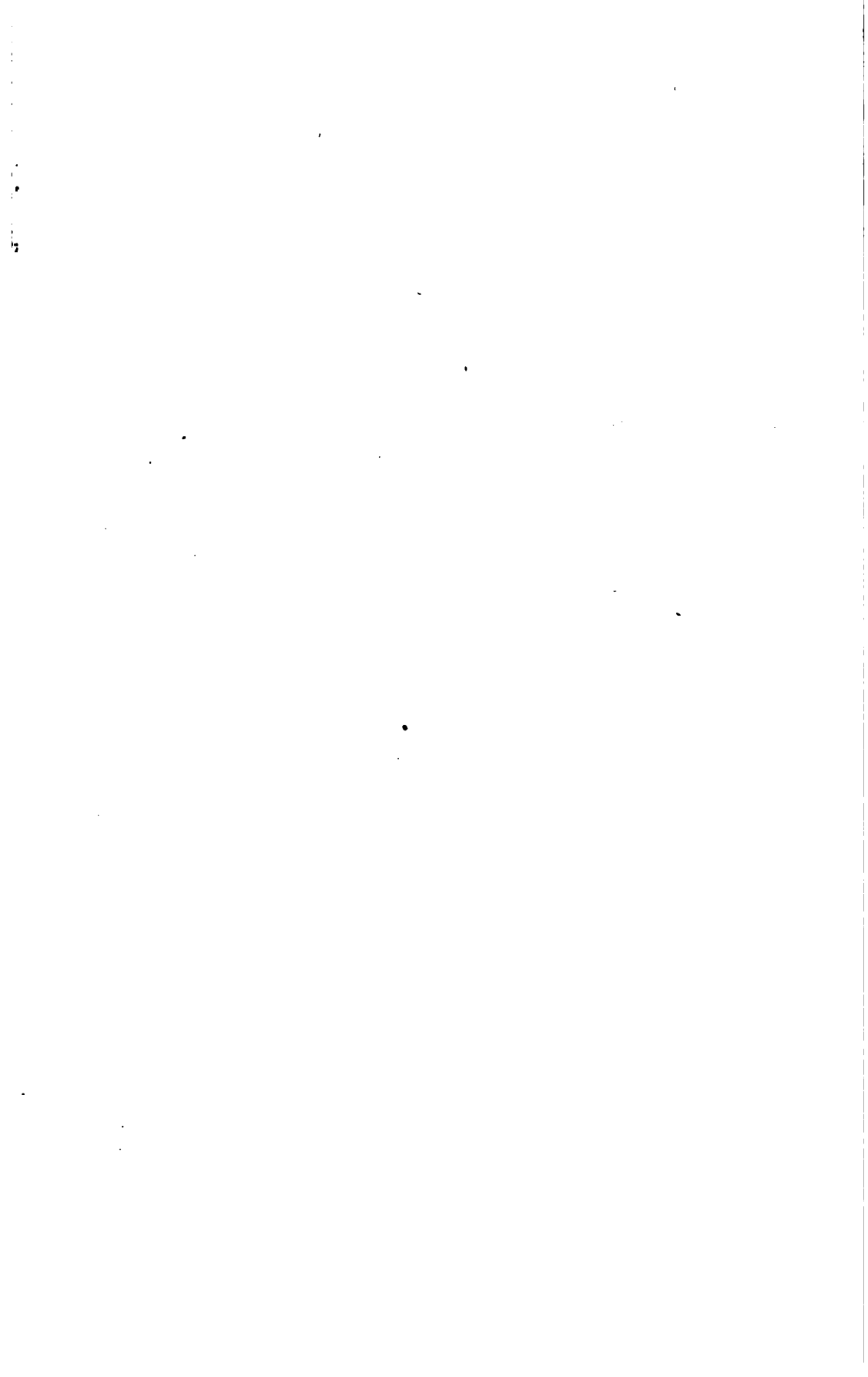
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